No 165

TRANSCRIPT OF RECORD

UNITED STATES
CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No. 9286

DORA B. HENDRON, ET AL.,

Appellants,

versus

YOUNT-LEE OIL COMPANY, ET AL.,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas.

INDEX

CAPTION.

DORA B. HENDRON, ET AL.

Appellants.

versus

YOUNT-LEE OIL COMPANY, ET AL.

Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas, Tyler Division.

1-a PRAECIPE.

In the United States District Court for the Tyler Division of the Eastern District of Texas.

Dora B. Hendron, Et Al, Plaintiffs,
vs. Civil Action No. 25
Yount-Lee Oil Company, Et Al, Defendants.

To Honorable Lee Simmons, Clerk of said Court:
Dear sir:

You are hereby instructed to prepare the record in the above styled and numbered cause and include therein copies of the following:

1. This praecipe.

2. Bill of Complaint.

3. Amendment to Bill of June 15, 1939.

4. Motion of Stanolind Oil & Gas Co., et al., to dismiss.

5. Motion of Sun Oil Company to dismiss.

6. Judgment of Court dismissing case.

7. Plaintiffs notice of appeal with file date.

Respectfully,
D. B. CHAPIN,
TUCK CHAPIN.
Per D. B. CHAPIN.
Attorneys for plaintiffs.

P. O. Address: Houston Bldg.,
San Antonio, Texas.

PLAINTIFF'S ORIGINAL COMPLAINT.

Filed Nov. 18, 1938.

1-b (Title Omitted.)

Tuck Chapin,
Mission & Tyler, Texas,
D. B. Chapin,
San Antonio, Texas.
Attorneys for plaintiff.

ALLEGATIONS OF FEDERAL JURISDICTION.

2 In the District Court of the United States for the Eastern District of Texas, Tyler Division.

Dora B. Hendron, joined pro forma by her husband, R. B. Hendron; Emil Claude Howard and Glenn Howard, Plaintiffs,

vs. Civil Action, File No. . . .

Yount-Lee Oil Company a corporation; Sun Oil Company, a corporation; Stanolind Oil and Gas Company, a corporation, Fidelity Royalty Company, a corporation, and S. G. Smith, Defendants.

To the Honorable, Randolph Bryant, Judge of said Court:

1.

(a) Jurisdiction founded on diversity of citizenship and amount in controversy.

Plaintiffs are citizens of and reside in Santa Clara County, State of California, and defendant, Yount-Lee Oil Company is a corporation incorporated under the laws of the State of Texas with its principal office in the City of Houston, Harris County, Texas; the defendant, S. G. Smith is a citizen of the State of Texas and resides in the City of Longview, Texas; the defendant Sun Oil Company is a corporation incorporated under the laws of the State of Delaware and has an office in the City of Dallas, Dallas County, Texas; the defendant, Stanolind Oil and Gas Company is a corporation incorporated under the laws of the State of Delaware and has office in the City of Houston, Harris County, Texas; the defendant, Fidelity Royalty Company is a corporation incorporated under the laws of the State of Oklahoma, with an office in the City of Fort Worth, Tarrant County, Texas. The amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(b) Jurisdiction founded on the existence of a federal question and amount in controversy.

Jurisdiction is also founded on the existence of a federal question for that in a suit instituted by plaintiffs against defendants in the District Court of Wood County, Texas; entitled Dora B. Hendron, et al vs. Yount-Lee Oil Company, et al, and numbered 7018 on the docket of said Court, to set aside a void execution sale of 53.1-3 acres of land, and to redeem said land from valid claim of judgment-creditors thereon, and to require defendants to account for rents and profits of the land, and offering to do equity, the State of Texas, acting by its judicial departments, viz; the said District Court, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, and the Supreme Court of Texas, in effect gave plaintiffs said property to the defendants without consideration, and that said Courts in so doing acted

arbitrarily and capriciously and refused to apply those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and acted fraudulently and discriminated against plaintiffs, and refused to award them relief accorded to others similarly situated and thereby deprived these plaintiffs of their property without due process of law and also denied them the equal protection of the laws and violated the provisions of the Fourteenth Amendment to the Federal Constitution, as is hereinafter summarized.

II.

Plaintiffs aver that they are the sole heirs at law of Z. T. Howard, deceased; that said Z. T. Howard prior to April 5, 1904, was lawfully seized in fee simple and possessed of that certain tract of land situated in Gregg County, Texas, and being a part of the Wm. Castelberry Survey, and described as follows, to-wit:

Beginning at the S E C of a 220 acre tract of land heretofore owned by H. B. Howard and wife, a 3 P. O. N. 54-2 7 vrs, and a P O S 79 W 13 6/10 vrs. which is gone and given a P. O. N. 75 E 6 2/5 vrs. instead of the one gone.

Thence North 225 vrs. for corner a pine tree N 65 E 3 vrs. a P. O. S. 80 E 2 vrs.

Thence West 1290 vrs. to center of Hawkins creek a sugar maple brs E 5 vrs.

Thence down said creek with its meanderings to the S W corner of said 220 acre tract a sweet gum brs E 4 vrs.

Thence East 1380 vrs. to the place of beginning and containing 53.1/3 acres of land.

That prior to April 5, 1904, two money judgments were obtained against said Z. T. Howard, one in the Justice's Court for precinct No. 1, in Wood County, Texas, and the other in the District Court for Wood County, Texas; that valid executions were duly issued on each of said judgments and placed in the hands of the Sheriff of Gregg County, Texas, for execution; that on April 5, 1904, said sheriff of Gregg County, purporting to act under the authority of said two executions, aforesaid, conducted an execution sale in Gregg County and, at said sale one W. R. Bass bid the sum of $103.00 for said land and same was struck off to him; that on same day said sheriff executed and delivered to said W. R. Bass a sheriff's deed, purporting on its face to convey unto said W. R. Bass all the interest of said Z. T. Howard in and to said land; that said W. R. Bass bought said land at said sale in good faith and believed he was getting title to the land, and his purchase money was applied in discharging said judgments and the costs of such sale; that said Bass got no title to said land under said sheriff's sale and deed for that (a) said sale under said Justice's Court execution was had after the return date of said execution, and (b) said sheriff did not levy said District Court execution on any land prior to the date of said sale or at all, and that by reason thereof said sheriff had no power to sell said land; that by reason of the aforesaid facts, said W. R. Bass became and was the equitable assignee of said judgment-creditors' claims, and was subrogated to all their rights; that said W. R. Bass in virtue of his purchase of said land at said sheriff's sale and the payment of the purchase money as aforesaid, entered into the actual possession of said land and was entitled to and did hold such possession as security for his debt, and in respect thereto occupied

the position of and was an equitable trustee or mortgagee in lawful possession with the legal right to retain such possession until reimbursed the amount he paid for said land with legal interest thereon, and in duty bound to preserve said property and make it productive and account on demand for the rents and profits thereof; that on April 9, 1904 said W. R. Bass, being in the actual possession of said land, and under the circumstances as aforesaid, executed and delivered to one S. R. Thrasher a deed conveying said land to him; that said S. R. Thrasher accepted said deed with full knowledge of the facts aforesaid; that said Thrasher got no title to said land under said deed, for that it was merely assignment of said judgment creditors' claims, as aforesaid, with the right of possession of the land; that said Thrasher, under his aforesaid deed became and was subrogated to all the rights of said judgment-creditors, and as such entered into the actual possession of the land and held same as security for the amount said W. R. Bass had paid for said land with legal interest thereon and in respect to such possession occupied the position of and was an equitable trustee or a mortgagee lawfully in possession, with the legal right to retain such possession until reimbursed, and was in duty bound to conserve said property and make it productive, and on demand account for the rents and profits thereof; that on March 8, 1905, said S. R. Thrasher, being in the actual possession of said land, as aforesaid, for value, executed and delivered to S. G. Smith a deed conveying said land to him; that said S. G. Smith accepted said deed with full knowledge of the facts aforesaid; that said S. G. Smith got no title to said land under said deed for that it was merely an assignment of said judgment-creditors' claims as aforesaid, with the right of possession of the land as security for his debt; that said Smith, under his aforesaid deed became and was subrogated to all the rights of said judgment-creditors, and as such entered into the actual pos-

session of the land and held same as security for the amount said W. R. Bass paid for the land with legal interest thereon from April 5, 1904, and in respect to such possession occupied the position of and was an equitable trustee or a mortgagee in lawful possession, with the legal right to retain such possession until reimbursed, and in duty bound to preserve said property and make it productive and to, on demand, account for the rents and profits thereof; that said Z. T. Howard died intestate in the year 1906, seized of the fee
4 simple title to said land, and entitled to the possession thereof upon doing equity to said S. G. Smith, by paying unto said S. G. Smith, the amount said W. R. Bass had paid for said land with 6% interest thereon from April 5, 1904, together with the amount of taxes which had been paid on said land, and the costs of necessary improvements placed on said property; that said Z. T. Howard was survived by plaintiffs who are his sole heirs at law, and as such succeeded to all the rights of their ancestor, said Z. T. Howard, deceased; that on July 6, 1908, said S. G. Smith, being in the actual possession of said land, as aforesaid, and with full knowledge of all the facts, as aforesaid, executed and delivered to one J. R. Castelberry a deed conveying said land to him; that said Castelberry accepted said deed with full knowledge of the aforesaid facts; that said Castelberry got no title to said land under said deed, for that it was merely an assignment of said judgment creditors' claims, as aforesaid, with the right of possession of the land; that said Castelberry under his aforesaid deed became and was subrogated to all the rights of said judgment-creditors, and as such entered into the actual possession of the land and held the same as security for the amount said W. R. Bass had paid for said land at said sheriff's sale with legal interest thereon, and in respect to such possession occupied the position of and was an equitable trustee or a mortgagee in lawful pos-

session, with the legal right to retain such possession until reimbursed, and was in duty bound to conserve said property and make it productive and on demand account for the rents and profits thereof; that on January 17, 1911, said J. R. Castelberry, being in the actual possession of said land as aforesaid, and holding the same under the circumstances aforesaid, executed and delivered to S. G. Smith a deed conveying said land to him; that said S. G. Smith accepted said deed with full knowledge of the aforesaid facts; that said Smith got no title to said land under said deed, for that it was merely an assignment of said judgment-creditors' claims, as aforesaid, with the right of possession of the land as security for his debt; that said S. G. Smith, under his aforesaid deed became and was subrogated to all the rights of said judgment-creditors, and as such entered into and now is in possession of the land and held and now holds the possession thereof as security for the amount said W. R. Bass paid for the land, with legal interest thereon, and the amount of taxes paid on the land and the costs of necessary improvements placed on the land, and in respect to such possession occupies the position of and is and was an equitable trustee or a mortgagee in lawful possession with the legal right to retain such possession until equity is done him, with the corresponding duty to conserve said property and make it productive and on demand account to the owners thereof for the rents and profits of the land; that the defendants herein, other than said S. G. Smith, are claiming interests in said land, by conveyances or mesne conveyances from and under said S. G. Smith; that oil was discovered and extracted from said land in A. D. 1931; that prior to that time there were no rents and profits taken from said land; that the claims of the defendants to said land is in subordination to these plaintiffs continuing right to redeem said land by doing equity; that said defendants are, under their conveyances, the assignees of said judg-

ment-creditors claims, as aforesaid, and on final account are entitled to said sum of $103.00 so paid by said W. R. Bass for said land with legal interest thereon from April 5, 1904, the amount of all taxes paid on said land and the reasonable and necessary costs of all improvements placed thereon, and are in duty bound to conserve said property and make it productive and on demand, account for the rents and profits thereof; that prior to October, 1934, plaintiffs made demand upon defendants for an accounting of the rents and profits of said land, and offered to redeem said land; that said defendants refused to account and permit plaintiffs to redeem by doing equity; that thereafter plaintiffs filed in the District Court of Wood County a suit against said defendants in which they sought to redeem said land from said void execution sale and therein offered to do equity; that said District Court rendered a take noting judgment against them; that on appeal from said judgment, the Court of Civil Appeals affirmed same, and in due course these plaintiffs made application to the Supreme Court of Texas for writ of error, which was denied; that in each instance, the State of Texas, acting by its said Judicial departments, deprived plaintiffs of their property without due process of law, and denied them the equal protection of the laws; that said State Court judgments are merely an arbitrary and capricious exercise of power, and in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights; that said Courts discriminated against plaintiffs and favored defendants; that their said conduct was peculiar to said litigation and contrary to that accorded others similarly situated, and that they unlawfully and fraudulently awarded plaintiffs said property to defendants without consideration; that their said acts are violative of the U. S. Constitution, 14th Amendment, as is hereinafter more fully summarized.

III.

Plaintiffs aver that in October, 1934, they filed suit in the District Court of Wood County, Texas, against the defendants, same being No. 7018, entitled Dora B. Hendron, et al vs. Yount-Lee Oil Company, et al, in which they sought to redeem said land from said defendants, and in substance alleged all the aforesaid acts, and offered to do equity on an accounting.

IV.

Plaintiffs further aver that the defendants in response to said pleading, by their answers plead, a general demurrer, a general denial, not guilty, the 4, 2, 3, 5, 10 and 25 years statutes of limitation, innocent purchaser for value and without notice, and good faith improvements.

V.

Plaintiffs further aver that there being no controverted questions of fact involved, but only questions of law, the case was submitted to said District Court upon an Agreed Statement of Facts wherein it was stipulated that:

(1) The plaintiffs are the sole heirs at law of Z. T. Howard, deceased, who, prior to and on April 5, 1904, was seized and possessed of said 53.1/3 acres of land above described, holding same as his separate property.

(2) On the 14th day of January, 1904, a valid judgment was rendered in favor of E. A. Tharp against said Z. T. Howard in Justice's Court, precinct No. 1, Wood County, Texas, for the sum of $50.00; and a valid execution was issued thereon directed to the sheriff or any constable of Gregg County, Texas, commanding him, etc., and said execution was placed in the hands of the sheriff of Gregg County for execution.

(3) The officers of the District Court of Wood County obtained a valid judgment against said Z. T. Howard for 1/4 of the costs in cause No. 1530, and a valid execution was issued thereon and same was placed in the hands of the said sheriff of Gregg County for execution.

(4) On April 5, 1904, S. R. Thrasher, sheriff of Gregg County, Texas, by virtue of said two executions, held a sale, and executed and delivered to one W. R. Bass a deed purporting to convey unto him all of the estate, right, title and interest which said Z. T. Howard had in said 53.1/3 acres of land, which deed is as follows:

"The State of Texas,
County of Gregg.

Know All Men By These Presents: That whereas, by virtue of certain executions issued out of the Justice Court of the County of Wood, Prec. No. 1, State of Texas, in favor of E. A. Tharp against Z. T. Howard also Execution issued out of the Hon. Dist. Court of Wood County, Texas, in favor of officers of the Court for 1/4 of the cost in the case No. 1530 in said District Court of Wood County, Z. T. Howard vs. Dora Fenton et al on certain judgments rendered by said Courts to-wit:

In said Justice Court on the 14th day of January 1904, on the 3rd day of December 1903 in the cause styled E. A. Tharp vs. Z. T. Howard and numbered 596, and in the cause styled Z. T. Howard vs. Dora Fenton et al defendants and numbered 1530 in the District Court aforesaid and both directed and delivered to me, as Sheriff of Gregg County, Texas, commanding me of the goods and chattels, lands and tenements of said Z. T. Howard to make certain moneys in said writs mentioned, I, S. R. Thrasher, as Sheriff aforesaid, did, upon the 22nd day of January A. D. 1904 levy on and seize all the estate, right, title and interest which the said defendant Z. T. Howard on the 22nd day

of January A. D. 1904 and on the 24th day of
6 February A. D. 1904 so had of, in and to the premises hereinafter described, and on the First Tuesday in April, A. D. 1904, the same being the fifth day of same month, within the hours prescribed by law sold said premises as public vendue in the said County of Gregg, at the door of the Court House thereof, having first advertised the time and place of said sale by causing notice thereof to be published in the English Language once a week for three consecutive weeks immediately preceeding said sale in the Times Clarion, a newspaper published in said Gregg County, the first of said publication having appeared not less than twenty days immediately preceding the said day of sale, which said notice contained a statement of the authority by virtue of which the sale was to be made the time of levy, the time and place of sale and the locality of the property, giving a brief description thereof, sufficiently to enable it to be reasonably known and identified; and whereas at the said sale, the premises were struck off to W. R. Bass for the sum of One Hundred & Three ($103.00) Dollars, he being the highest bidder therefor, and that being the highest secure bid for the same.

"Now therefore, in consideration and by virtue of the premises aforesaid and of the payment of the sum of One Hundred & Three ($103.00) Dollars, the receipt of which is hereby acknowledged, I, S. R. Thrasher, Sheriff as aforesaid, have granted, sold and conveyed and by these presents do grant sell and convey unto the said W. R. Bass all the estate, right, title and interest of the said Z. T. Howard in and to the following described premises, viz.;

(Here follows a full description of said land, being same as was set out in the pleadings in this cause.)

"To have and to hold the above described premises, unto the said W. R. Bass heirs and assigns, forever, as fully and as absolutely as I, as Sheriff as aforesaid, can convey by virtue of said writ of execution.

"In testimony whereof, I have hereunto set my hand, this 5th day of April, A. D. 1904.

S. R. THRASHER,
Sheriff of Gregg County,
Texas."

(5) The papers in said Justice's Court Case are lost.

(6) The execution issued on the judgment in the District Court Case was returned to said Court, and reads as follows:

"Sheriff's Return.

"Came to hand 24th day of February, 1904, at 9 o'clock A. M., and executed on the 24th day of February 1904, by levying on the following described property to-wit: and on the 24th day of February, 1904, by advertising the same to be sold before the Court House door of Gregg County, Texas, on the first Tuesday in April, 1904, by an advertisement in the English language in the Times Clarion, a newspaper published in said County, once a week for three consecutive weeks immediately preceding said sale. The first publication of which appeared on the — day of —— 1904, the same being not less than 20 days immediately preceeding the day of sale; and on the first Tuesday in April, 1904, before the Court House door as aforesaid and within the hours prescribed by law for Sheriff's sales, I sold said premises at public vendue, when the sale were struck off to W. R. Bass for the sum of $31.28, he being the highest bidder therefor, and that being the highest accure bid for

the same; and that after first satisfying the Sheriff's cost accrued under this writ, amounting to the sum of $10.35, an itemized bill of which appears below and the further sum of $..... original Court cost, the remainder being the sum of $20.53 being amount of execution and judgment and the further sum of $6.28 being amount above judgment and costs was paid to P. N. Thomas, whose receipt for same is herewith presented, and this writ is hereby returned.

S. R. THRASHER,
Sheriff Gregg Co., Texas."

(7) The said W. R. Bass purchased said land at said sheriff's sale in good faith, and believed that he was getting the title thereto, and his purchase money was applied in satisfying said two judgments under which said land was sold.

(8) Immediately after said Bass purchased said land he entered into the actual possession thereof, and remained in possession until April 9, 1904, when he conveyed it to S. R. Thrasher by deed without covenants of warranty, for a valuable consideration, which deed was filed on October 6, 1904, and recorded in Vol. "U" p. 399 deed records Gregg County.

(9) On March 8, 1905, said S. R. Thrasher executed and delivered to defendant, S. G. Smith a deed without covenants of warranty to said land for a valuable consideration.

(10) On July 6, 1908, said S. G. Smith executed and delivered to J. R. Castelberry a deed with covenants of warranty covering said land for a valuable consideration.

(11) On January 17, 1911, said J. R. Castelberry executed and delivered to said S. G. Smith a deed with

covenants of general warranty covering said land for a valuable consideration.

7 (12) On May 6, 1930, said S. G. Smith and wife executed and delivered an oil, gas and mining lease covering said land to B. A. Skipper for a valuable consideration and a 1/8 royalty of all minerals produced from said land; said lease being for 5 years and as long thereafter as oil or gas is produced.

(13) On September 11, 1930, said B. A. Skipper executed and delivered an assignment of said oil, gas and mining lease to W. W. Lechner for a valuable consideration.

(14) On September 15, 1930, said W. W. Lechner executed and delivered an assignment of said oil, gas and mining lease to J. E. Farrell for a valuable consideration.

(15) On March 11, 1931, said J. E. Farrell executed and delivered an assignment of said oil, gas and mining lease to defendant, Yount-Lee Oil Company for a valuable consideration.

(16) On July 31, 1935, said Yount-Lee Oil Company executed and delivered an assignment of said oil, gas and mining lease to Wright Morrow for a valuable consideration.

(17) On July 31, 1935, said Wright Morrow executed and delivered an assignment of said oil, gas and mining lease to defendant Stanolind Oil and Gas Company for a valuable consideration.

(18) On January 15, 1931, said S. G. Smith and wife, executed and delivered to defendant, Sun Oil Company a mineral deed covering 1/4 of the minerals under said

land, subject to the oil, gas and mining lease thereon, for a valuable consideration.

(19) On April 4, 1931, said S. G. Smith and wife, executed and delivered a mineral deed covering 1/8 of the minerals under said land subject to any valid oil, gas and mining lease thereon to A. W. Gilliland, for a valuable consideration.

(20) On January 20, 1933, said A. W. Gilliland executed and delivered a mineral deed conveying 1/8 of the minerals under said land subject to any valid oil, gas and mining lease thereon to Fidelity Royalty Company, for a valuable consideration.

(21) All of the above deeds, leases and assignments were duly acknowledged contemporaneously with their execution, and filed and recorded in the deed records of Gregg County.

(22) The defendant, Yount-Lee Oil Company entered upon said land in A. D. 1931, in good faith believing it had title thereto and drilled a number of oil wells thereon and produced therefrom down to November 30, 1934, a total of 319,518.99 barrels of crude oil of the reasonable market value at the time it was produced of $262,597.25 and produced therefrom from November 30, 1934, to August 1, 1935, 62,866.47 barrels of crude oil of the reasonable market value of $62,866.47.

(23) The defendant Yount-Lee Oil Company spent to November 30, 1934, the sum of $149,595.45 and from November 30, 1934 to August 1, 1935, the sum of $11,183.33, in drilling, developing, equipping and operating said lease and paying taxes thereon, and that such expenditures were reasonable and necessary to produce oil therefrom.

(24) The defendant, said Stanolind Oil and Gas Company entered upon said land on the 1st day of August, 1935 and from that date until the 1st day of May, 1936, produced therefrom a total of 61,396.96 barrels of crude oil of the reasonable market value at the time it was produced of $65,166.18.

(25) Said Stanolind Oil and Gas Company has spent the sum of $12,239.70 in drilling, developing, equipping and operating said lease and paying taxes thereon from the 1st day of August, 1935 to the first day of May, 1936, and that such expenditures were reasonable and necessary to produce the oil therefrom.

(26) The defendant S. G. Smith has received for his share of the oil produced from said property the
8 sum of $30,518.60 from the date oil was first produced in 1931 to the 1st day of May, 1936.

(27) The defendant Sun Oil Company has received for its share of the oil produced from said property the sum of $12,207.45 from the date oil was first produced in 1931 to the 1st day of May, 1936.

(28) The defendant, Fidelity Royalty Company has received for its share of the oil produced from said property from the 23rd day of March, 1933, to the 1st day of May, 1936, the sum of $4,913.61.

(29) Each purchaser and/or leassee and assigns above named of said 53.1/3 acres of land purchased in good faith, paying a valuable consideration, each believing they were getting a good title thereto.

(30) The said W. R. Bass and those claiming under him to have been in peacable possession of said land, claiming same as their own since the 5th day of April,

1904, claiming, using, occupying and enjoying the same continuously from that date to the time of the trial hereof, paying all taxes thereon before they became delinquent; said possession being at all times open and notorious, visible and exclusive. Said land was well fenced and cultivated each and every year from said date until the year 1931 and since that time the defendants herein, Yount-Lee Oil Company and Stanolind Oil and Gas Company have produced oil therefrom continuously to the date of the trial hereof. That during the time of cultivation there were dwelling houses and barns thereon and the dwelling houses were continuously occupied and lived in from May 1, 1905 to 1933.

(31) Plaintiffs original petition was filed in said District Court on October 9, 1934.

(32) Plaintiffs in their pleading and in open Court at the trial offered to do such equities in regard to the matters aforesaid as the Court may order and decree.

(33) No profits or rents were taken from said land prior to the discovery of oil thereon in 1931.

VI.

Plaintiffs aver that the Law Questions thus presented to said District Court are summarized as follows:

(1) Is a sheriff's sale of land made under an execution issued by a Justice's Court, after the return day of the execution, valid or void?

(2) Is a sheriff's sale of land under a valid execution without a levy thereof on the land valid or void?

(3) Where a stranger in good faith purchases land at a void execution sale, believing that he was getting the title and his purchase money is applied in discharge of the judgments under which the land is sold, is he to be treated as a trespasser or is he subrogated to the rights of the judgment creditor?

(4) Where a stranger, in good faith, purchases land at a void execution sale, believing that he is getting the title to the land, and his purchase money is applied in discharge of the judgment under which the sale is made, and he obtains a deed to the land and enters into the actual possession of the land, and conveys the land, is the purchaser, his grantee or any successor in interest of the latter, considered an assignee of the debt, and equitable trustee or mortgagee in lawful possession, with the right to retain possession until reimbursed, or are they trespassers?

(5) Is the possession of land by a trustee or mortgagee lawfully in possession, with the right to retain possession until reimbursed, adverse to the true owner of the land while the relationship of mortgagor and trustee or mortgagee exists, or is such possession lawful and in subordination to the owners right to redeem by doing equity?

VII.

Plaintiffs further aver that on the 2nd day of February, 1937, said cause No. 7018, entitled Dora B. Hendron, et al vs. Yount-Lee Oil Company, et al, was heard by said District Court on the pleadings and said stipulation of facts, and that said Court thereon entered a "take nothing" judgment against plaintiffs, and that plaintiffs excepted to such action of the Court and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme

Judicial District of Texas, at Texarkana, and that said exception and notice of appeal was entered of record.

And in this connection plaintiffs aver that the rendition of said judgment was and is merely an arbitrary and capricious exercise of power, and is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights; that said Court in rendering said judgment discriminated against plaintiffs and favored defendants; that its act in rendering said judgment was peculiar to said litigation and contrary to that accorded to others similarly situated; that its said act in so doing constitutes a fraud upon the plaintiffs; that thereby the plaintiffs were deprived of their property without due process of law, and were denied the equal protection of the laws, and hence the State of Texas, acting through its agent, violated the U. S. Constitution, 14th Amendment, as is hereinafter more fully shown; that hereby and by reason thereof the defendants acquired plaintiffs' said property *mala fides* and, in consequence, holds same as trustees, as is hereinafter shown.

VIII.

Plaintiffs further aver that they perfected said appeal in said Courts of Civil Appeals by giving the bond required by law, and filed therein a transcript of the record of said cause, and that said cause was docketed in said Court as No. 5320, entitled Dora B. Hendron, et al, Appellant vs. Yount-Lee Oil Company, et al, Appellees.

IX.

Plaintiffs further allege that in due course they, as appellants in said Court of Civil Appeals, filed therein

their Assignments of Error committed by the Trial Court in the trial of said cause, which are as follows:

(1) Our applicable statute providing that a Justice Court execution shall be returned within sixty days, and it being shown that the Justice's Court execution upon which the sheriff of Gregg County sold said land to W. R. Bass on the 5th day of April, 1904, was issued on the 22nd day of January, 1904, the Trial Court should have found as a matter of law, that said sheriff's sale was void.

(2) It being shown that the sheriff of Gregg County did not levy on any land under said execution issued by the District Court of Wood County prior to the time he sold said land to W. R. Bass, or at all, the Trial Court should have found, as a matter of law, that said sheriff's sale was void.

(3) It being shown that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and that said sheriff's sale to him was void, and that said Bass purchased said land in good faith, believing that he was getting title thereto, and that his bid discharged said judgments, the Court should have held that, as a matter of law, said Bass was subrogated to the claims of said judgment-creditors' as much so as if said judgment-creditors' had transferred said judgments to him.

(4) It being shown that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale was void, and further that said Bass purchased said land in good faith believing that he was getting the title thereto, and further that the purchase money he paid for said land discharged said judgments,

and further that he was subrogated to said creditors' claims and rights, and entered into the actual possession of the land under said sheriff's sale, the Court should have held that he must be treated as a trustee or mortgagee in possession, with the legal right to hold possession until reimbursed the amount of his bid, with legal interest thereon, and taxes paid by him on said bond.

(5) It being shown that the judgments and executions under which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale was void, and further that said Bass purchased said land at said sheriff's sale in good faith and believed that he was getting the land, and further that the purchase money he paid for said land was applied in discharging said judgments, and further that said Bass entered into the actual possession of said land under said sheriff's sale, the Trial Court erred in holding that said Bass was a limitation claimant of said land.

(6) It being shown that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale of said land to Bass was void, and further that said Bass purchased said land at said sheriff's sale in good faith, believing that he was getting a good title thereto, and further that the purchase money he paid for said land discharged said judgments, and further that said Bass entered into the actual possession of said land under said sheriff's sale, and conveyed said land to S. R. Thrasher, who purchased the same in good faith believing that he was getting a good title thereto, but said Thrasher being charged with notice of the facts aforesaid was not an innocent purchaser for value and without notice, the Court should have found, as a matter of law, that the deed from Bass to Thrasher conveyed

no title to said land, but was merely an assignment of said judgment-creditors' claims to the extent that said Bass had been subrogated to them.

(7) It being shown that S. R. Thrasher, at the time he took the conveyance of said land from said Bass, had constructive notice that the said sheriff's sale of said land to said Bass was void and passed no title to said land to said Bass, but that said Bass, by reason of his good faith purchase and payment of the money which went to discharge said judgments, was the equitable assignee of said judgment debts to the extent his payment discharged same, and that said Bass was a mortgagee of the land and lawfully in possession thereof, with the right to hold possession until reimbursed, he, said Thrasher having entered into possession of said land under said deed, the Court should have held, as a matter of law, that he, said Thrasher, occupied, in respect thereto, the position of a mortgagee in possession.

(8) It being shown that said Thrasher entered into possession of said land under rights which he supposed he acquired by Bass' conveyance to him, believing himself to be the owner of the premises, and having notice that Bass had no title to said land, but merely a lien thereon, the Trial Court should have found, as a matter of law, that said Thrasher was entitled to retain possession thereof until reimbursed the amount said Bass had paid as the purchase price for said land with 6% interest thereon from the date of said purchase, and taxes paid by him, if any.

(9) It being shown that the judgments and executions under which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale was void, and further that said Bass purchased said land in good faith and believed that

he was getting the land, and further that the purchase money he paid for said land was applied in discharging said judgments, and further that said Bass entered into the actual possession of said land under said sheriff's sale, and afterwards conveyed the said land to R. S. Thrasher, the Court erred in not rendering judgment for the plaintiffs, thereby holding, in effect, that said S. R. Trasher was a limitation claimant to said land.

(10) It being shown that the judgments and executions under which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale of said land to Bass was void, and further that said Bass purchased said land at said sheriff's sale in good faith believing that he was getting a good title thereto, and further that the purchase money he paid for said land discharged said judgments, and further that said Bass entered into the actual possession of said land under said sheriff's sale, and conveyed said land to
11 S. R. Thrasher, who purchased same in good faith believing that he was getting a good title thereto, but said Thrasher being charged with notice of the facts aforesaid, and having entered into possession thereof, and afterwards conveyed said land to defendant, S. G. Smith, who purchased same in good faith believing that he was getting a title to the land, but was charged with notice of the facts aforesaid, and under said deed entered into the actual possession thereof, the Court should have held, as a matter of law, that said S. G. Smith acquired no title to the land by virtue of said deed from Thrasher to him, but that it was merely an assignment of said judgment-creditors' claims, to the extent that said Bass and Thrasher owned same, with their right of reimbursement.

(11) It being shown that S. G. Smith, at the time he took the conveyance of said land from said Thrasher,

had constructive notice that his predecessor in title, said W. R. Bass, owned no title to said land but simply had a lien thereon and held possession thereof, as a mortgagee in lawful possession, and that said S. R. Thrasher had no title to said land, but simply held a lien thereon, and was a mortgagee in lawful possession thereof, and said S. G. Smith having under said circumstances entered into the possession of said land, the Court should have held, as a matter of law, that said S. G. Smith was and is simply a mortgagee lawfully in possession of said land.

(12) It being shown that said S. G. Smith entered into possession of said land under rights which he supposed he acquired by the conveyance thereof to him by said Thrasher, believing himself to be the owner of the premises, and having notice that his predecessors in title had no title thereto, but that they were mortgagees lawfully in possession, the Court should have found, as a matter of law, that said S. G. Smith was entitled to retain possession thereof until reimbursed the amount said Bass had paid as the purchase price of said land, with interest at the rate of 6% thereon from the date of said purchase by said Bass; the taxes, if any, paid by them on said land, and the costs of necessary improvements placed on said land, if any.

(13) It being shown that the judgments and executions under which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale of said land to said Bass was void, and further that said Bass purchased said land at said sheriff's sale in good faith believing that he was getting the land, and further that the purchase money he paid for said land discharged said judgments, and further that said Bass entered into the actual possession of said land under said sheriff's sale, and conveyed said land to S. R.

Thrasher, who purchased the same in good faith, but charged with notice of the facts aforesaid, and having entered into the actual possession of said land, and afterwards conveyed said land to S. G. Smith, who purchased in good faith, believing that he was getting the land, and entered into the actual possession thereof, the Court erred in holding that said S. G. Smith was a limitation claimant to the land.

(14) It being shown that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and further that said sheriff's sale of said land to said Bass was void, and further that said Bass purchased said land at said sheriff's sale in good faith believing that he was getting a good title thereto, and further that the purchase money he paid for said land discharged said judgments, and further that said Bass entered into the actual possession of said land under said sheriff's sale, and conveyed said land to S. R. Thrasher, who purchased the same in good faith believing that he was getting a good title thereto, but said Thrasher being charged with notice of the facts aforesaid, and having entered into the possession thereof, and afterwards conveyed said land to S. G. Smith, who purchased same in good faith believing he was getting the title to said land, but was charged with notice of the facts aforesaid, and under said deed entered into the actual possession thereof, and afterwards conveyed said land to J. R. Castelberry, who purchased the same in good faith believing he was getting a good title thereto, but said Castelberry being charged with notice of the facts aforesaid, and having entered into the actual possession thereof, the Court erred in failing and refusing to hold, as a matter of law, that said Castelberry acquired no title to said land by virtue of said deed from S. G. Smith to him, but that it was merely an assignment of said judgment-creditors' claims, to the extent that said

Bass, Thrasher and Smith owned same, with their right to reimbursement.

12 (15) It being shown that J. R. Castelberry, at the time he took the conveyance of said land from said S. G. Smith, had constructive notice that his predecessors in title, W. R. Bass, owned no title to said land but simply held a lien thereon, and had held possession thereof as a mortgagee in lawful possession, and that said Thrasher had no title to said land, but simply held a lien thereon and was a mortgagee in lawful possession thereof, and that his vendor, S. G. Smith had no title to said land, but had a lien thereon, and was mortgagee in lawful possession thereof, and said J. R. Castelberry having under said circumstances entered into the actual possession of said land, the Court erred in failing and refusing to hold, as a matter of law, that said Castelberry was a mortgagee lawfully in possession of said land.

(16) It being shown that J. R. Castelberry entered into possession of said land under rights which he supposed he acquired by the conveyance thereof to him by said S. G. Smith, believing himself to be the owner of the premises, and having notice that his predecessors in title had no title thereto, but they and each of them were mortgagees in lawful possession, the Court erred in failing and refusing to hold, as a matter of law, that said J. R. Castelberry was entitled to retain possession thereof until reimbursed the amount said Bass had paid as the purchase price for said land, with legal interest thereon from the date of said sheriff's sale, the taxes if any, paid on said land, and costs of reasonable improvements placed on said land, if any.

(17) It being shown that the judgments and executions under which the sheriff of Gregg County sold said

land to W. R. Bass were valid, and that sheriff's sale of said land to Bass was void, and that said Bass purchased said land at said sheriff's sale in good faith believing he was getting the land, and that the purchase money he paid for said land discharged said judgments and that said Bass entered into the actual possession of said land under said sheriff's sale and conveyed said land to S. R. Thrasher who took with notice and that said Thrasher entered into the actual possession of said land and conveyed the same to S. G. Smith who took with notice and that said S. G. Smith entered into the actual possession of said land and conveyed the same to J. R. Castelberry who took with notice of all the facts aforesaid, the Court erred, as a matter of law, in holding that said J. R. Castelberry was a limitation claimant to said land.

(18) It being shown that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and that said sheriff's sale of said land to Bass was void, and that said Bass purchased said land at said sheriff's sale in good faith believing he was getting a good title thereto, and that the purchase money he paid for said land discharged said judgments, and that said Bass entered into the actual possession of said land under said sheriff's sale and conveyed said land to S. R. Thrasher, who purchased the same in good faith believing he was getting a good title thereto, but said Thrasher being charged with notice of the facts aforesaid, and entered into the actual possession thereof, and afterwards conveyed said land to said S. G. Smith, who purchased same in good faith believing he was getting a good title thereto, but said Smith being charged with notice of the facts aforesaid, and entered into the actual possession thereof, and afterwards conveyed said land to J. R. Castelberry, who took with notice of the facts aforesaid, and entered into the actual possession thereof and afterwards reconveyed said land

to the defendant, S. G. Smith, who took with notice of the facts aforesaid, the Court erred in failing and refusing to hold, as a matter of law, that said S. G. Smith acquired no title to said land by virtue of said deed from J. R. Castelberry to him, but that it was merely an assignment of said judgments to him to the extent that said W. R. Bass had owned same.

(19) It being shown that defendant, S. G. Smith, at the time he took the conveyance of said land from said J. R. Castelberry, had constructive notice that his predecessor in title, W. R. Bass, owned no title to said land but simply had a lien thereon and had held possession thereof as a mortgagee lawfully in possession thereof, and that said Thrasher, S. G. Smith, and Castelberry each had no title to said land but that each of them stood in the shoes of said Bass, and were the assignees of said judgments, and said S. G. Smith having entered into the possession of said land under the conveyance to him by said J. R. Castelberry, the Court erred in failing
13 and refusing to hold, as a matter of law, that said S. G. Smith was and is a mortgagee lawfully in possession of said land.

(20) It being shown that defendant, S. G. Smith entered into possession of said land under rights which he supposed he acquired by the conveyance thereof to him by said J. R. Castelberry, believing himself to be the owner of the premises, and having notice that his predecessors in title had no title thereto, but that they and each of them, were mortgagees in lawful possession of said land, the Court erred in failing and refusing to find, as a matter of law, that said S. G. Smith was entitled to retain possession of said land until reimbursed the amount said W. R. Bass had paid as the purchase price for said land with legal interest thereon from the date of his purchase, the taxes, if any, paid on said

land, and costs of reasonable improvements, if any, placed on said land.

(21) It being shown that said S. G. Smith entered into possession of said land under rights which he supposed he acquired by the conveyance thereof to him by J. R. Castelberry, but having notice of the fact that his predecessors in title had no title to the land but that they merely had a lien hereon with the rights of a mortgagee in possession, the Court erred, as a matter of law, in holding that said S. G. Smith was a limitation claimant to the land.

(22) It being shown that the appellees, other than said S. G. Smith, are claiming interests in said land by mesne conveyance from and under said S. G. Smith, the Court erred in failing and refusing to find, as a matter of law, that such instruments under which said appellees claim, conveyed no title to said land or any part thereof, but that they were and are merely assignments of interests in said judgments.

(23) It being shown that the appellees, other than said S. G. Smith, holding and claiming interests in said land by mesne conveyances from and under said S. G. Smith, had constructive notice that said S. G. Smith had no title to said land, but merely had a lien thereon, and was a mortgagee lawfully in possession thereof with the legal right to hold such possession until reimbursed, and said appellees having entered into the joint possession of said land with said S. G. Smith, the Court erred in failing and refusing to find that as a matter of law, they were mortgagees lawfully in possession of the land and were entitled to retain such possession until equity is done.

(24) The Court should not have held that plaintiffs' claims was barred by any of the statutes of limitation

applicable to actions to recover real estate, because it is shown that this is not an action to recover real estate but an equitable suit to redeem land from a void execution sale.

(25) The Court should not have held that plaintiffs' claim was barred by any of the statutes of limitations because it being shown that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and that said sheriff's sale of said land to W. R. Bass was void and passed no title, and that said Bass purchased said land at said sheriff's sale in good faith and believed that he was getting title to the land and that the purchase money he paid for said land went to discharge said judgments, and that said Bass entered into the actual possession of said land under said sheriff's sale, and that the appellees hold and claim said land by mesne conveyances from and under said W. R. Bass, and are in possession thereof as trustees or mortgagees lawfully in possession, and it being further shown that there were no rents or profits taken from said land by said W. R. Bass nor his successors in title until the latter part of A. D., 1931, when crude oil was extracted therefrom by said defendants (appellees) in sufficient quantity and value which they appropriated to their own use and therefore reimbursed themselves out of the rents and profits of said land, and hence the statutes of limitation applicable to actions to recover real estate could not commence to run prior to that time, and this suit was filed Oct. 9, 1934.

(26) It being shown that appellees claimed said land by mesne conveyances from and under said W. R. Bass who had no title to said land but had merely a lien thereon and the right to possession until reimbursed,
14 and that appellees and their predecessors in title took said land charged with notice of such fact, the Court should not have rendered judgment

for defendants upon their plea of the five-year statute of limitations, because such plea is available only to a defendant who has claimed under a deed, and such plea is not available to one claiming under absolute deeds, which are in fact, and known by him to be an assignment of a debt, lien and right of possession.

X.

Plaintiffs further aver that they also filed in said Court of Civil Appeals their brief, in which each of the aforesaid assignments of error were discussed, with a statement of the evidence in respect thereof, and the authorities sustaining the same.

XI.

Plaintiffs further aver that said defendants, as appellees in said Court of Civil Appeals, in response to these plaintiffs' aforesaid assignments of error, filed therein their Counter Propositions, in which they pretended and contended:

1. Appellants' right to maintain a suit making a direct attack upon the sheriff's sale is barred by the four-year statute of limitation, and this proceeding must, therefore, be treated and considered as a collateral attack upon such sale.

When said appellees then and there well knew that appellants' contention was that said sheriff's sale was absolutely void, not voidable.

2. It being admitted that the judgments and executions upon which the sheriff of Gregg County sold said land to W. R. Bass were valid, and the sheriff's deed having recited that he levied upon the property involved on

January 22, 1904, under the District Court judgment, the sheriff's sale is valid, notwithstanding the fact that the sheriff's return did not *fully* recite such levy.

When said appellees then and there well knew that said officer made no levy at all, as shown by his said return, and that there is a distinction between "no levy" and one not *fully* or *defectively* made as is hereinafter shown.

3. *Appellees first counter-proposition to Appellants' Propositions Nos. 3 through 13.*

Appellants can not claim exemption from the operation of the statutes of limitation since the Legislature has not, either expressly or by necessary implication, provided an exception to the running of the statutes of limitation which is applicable to appellants' case.

When said appellees then well know that the statutes of limitation are not available to a mortgagee lawfully in possession with the right to retain such until reimbursed.

4. *Appellees' Second Counter-Proposition to Appellants Propositions Nos. 3 through 13.*

Since appellants' right of suit existed at all times after the sheriff's sale and was dependent only upon the performance of a preliminary act by appellants, which they had in their power to perform, appellants could not suspend the running of the statutes of limitation by delay in the performance of such preliminary act, to-wit, the tender of the price paid on the sheriff's sale, and the statute of limitations commenced to run upon Bass' entry upon the property in 1904.

When said appellees then well know that Bass, or his successors had the right to have executions issued and the land legally sold, or to do, as they did, hold possession until reimbursed.

5. *Appellees' Third Counter-Proposition to Appellants Propositions Nos. 3 through 13.*

If it be conceded, for the purpose of argument, that appellees stood in the relation of constructive trutees with reference to their possession of the property involved, still the statute of limitations would apply since the rule that the statute of limitation will not run in favor of a trustee until his repudiation of the trust, applies only to express or direct trusts, and does not apply to a constructive trust.

When said appellees well knew that the statutes of limitation do not apply to "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of Courts of Equity, which is the status of defendants.

6. *Appellees' Fourth Counter Proposition to Appellants' Propositions Nos. 3 through 13.*

This being a collateral attack upon the sheriffs sale to Bass, appellants' suit is barred under the five, ten and twenty five year statutes of limitation.

When said appellees well knew that if said sheriff's sale passed title to the land, the plea of limitations is useless, but if said sale is *void then* such plea is futile, for that their possession was lawful and in subordination to these plaintiffs right to redeem by doing equity.

7. *Appellees' First Counter-Proposition to Appellants Propositions 14 through 26.*

The statutes of limitation of five, ten and twenty-five years would bar appellants' suit even if appellants were correct in all contentions advanced in appellants' brief, because if it be conceded, for the purpose of argument only, that the sheriff's sale was void and that Bass should be treated either as a mortgagee in possession or as a constructive trustee, still limitation would begin to run upon repudiation of the assumed relationship, and his deed to Thrasher conveying said property to the latter, which was executed on April 9, 1904, and recorded October 6, 1904, was a sufficient repudiation of the relationship of mortgagee or trustee as between Bass and appellants' and appellants' predecessor in title to commence the running of the period of limitation.

When said appellees well knew that W. B. Bass under his purchase at said sheriff's sale became the equitable assignee of said judgment-creditors' claims, and that he had a legal right to hold possession of the land until he was reimbursed the amount he had paid for the land and that such possession was in subordination to plaintiffs right to redeem by doing equity, and that Thrasher accepted said deed with notice that Bass had no title, and in consequence, said deed passed no title but operated merely as an assignment of said judgment-creditors claims, with the right of possession.

XII.

Plaintiffs further aver that said appellees made the aforesaid contentions, well knowing that they were unsound in law, with the deliberate intent to induce the said Court to affirm said judgment, which it did; that said Court overruled all of plaintiffs aforesaid assign-

ments of error and sustained each of appellees aforesaid counter-propositions, and that in so doing, as is hereinafter shown, said Court acted arbitrarily and capriciously, and refused to apply those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and discriminated against plaintiffs and favored defendants, and their conduct was and is peculiar to that litigation and contrary to that accorded to others similarly situated, and its said act in affirming said judgment is a fraud upon the plaintiffs, as is hereinafter shown; that said Court's opinion is reported in Vol. 119 S. W. (2) 171, and is as follows:

Appeal from District Court of Wood County, Texas.

"Dora B. Hendron, et al, Appellants,
vs. No. 5320
Yount-Lee Oil Company et al., Appellees.

Appellants, Dora B. Hendron, joined by her husband, Emil C. Howard and Charles G. Howard, heirs at law of Z. T. Howard, deceased, filed this suit on October 9, 1934, seeking to set aside an execution sale of 53-1 3 acre of land situated in Gregg County, made on April 5, 1904, by the Gregg County sheriff to one W. R. Bass. Appellants alleged this sale to be void; sought an accounting for rents and profits, offering to redeem this land from two judgment liens under which sale was made, and to do and perform such equities as the Court might decree. Appellees, S. G. Smith, A. W. Gilliland, Yount-Lee Oil Company, Sun Oil Company, and Stanolind Oil & Gas Company, defendants, below, being the present fee, royalty, and lease-held owners, answered with general demurrer and denial, plea of not guilty, and the two, three, four, five, ten and twenty-five year statutes of limitation. Improvement on good faith was also pleaded by the

leaseholders. The trial was had to the Court upon an agreed statement of facts and judgment entered that plaintiffs take nothing from defendants.

On April 5, 1904, said sheriff executed, acknowledged, and delivered to said Bass a sheriff's deed reading as follows:

16 "The State of Texas,
County of Gregg.

Know All Men By These Presents: That whereas, by virtue of certain executions issued out of the Justice Court of the County of Wood, Prec. No. 1, State of Texas, in favor of E. A. Tharp against Z. T. Howard also Execution issued out of the Hon. Dist. Court of Wood County, Texas, in favor of officers of the Court for 1/4 of the cost in the case No. 1530 in said District Court of Wood County, Z. T. Howard vs. Dora Fenton et al on certain judgments rendered by said Courts to-wit:

In said Justice Court on the 14th day of January 1904, on the 3rd day of December 1903 in the cause styled E. A. Tharp vs. Z. T. Howard and numbered 596, and in the cause styled Z. T. Howard vs. Dora Fenton et al defendants and numbered 1530 in the District Court aforesaid and both directed and delivered to me, as Sheriff of Gregg County, Texas, commanding me of the goods and chattels, lands and tenements of said Z. T. Howard to make certain moneys in said writs mentioned, I, S. R. Thrasher, as Sheriff aforesaid, did, upon the 22nd day of January A. D. 1904 levy on and seize all the estate, right, title and interest which the said defendant Z. T. Howard on the 22nd day of January A. D. 1904 and on the 24th day of February A. D. 1904 so had of, in and to the premises hereinafter described, and on the First Tuesday in April, A. D. 1904, the same being the fifth day of same month, within the hours prescribed by law

sold said premises as public vendue in the said County of Gregg, at the door of the Court House thereof, having first advertised the time and place of said sale by causing notice thereof to be published in the English Language once a week for three consecutive weeks immediately preceeding said sale in the Times Clarion, a newspaper published in said Gregg County, the first of said publication having appeared not less than twenty days immediately preceding the said day of sale, which said notice contained a statement of the authority by virtue of which the sale was to be made, the time of levy, the time and place of sale and the locality of the property, giving a brief description thereof, sufficiently to enable it to be reasonably known and identified; and whereas at the said sale, the premises were struck off to W. R. Bass for the sum of One Hundred & Three ($103.00) Dollars, he being the highest bidder therefor, and that being the highest secure bid for the same.

"Now therefore, in consideration and by virtue of the premises aforesaid and of the payment of the sum of One Hundred & Three ($103.00) Dollars, the receipt of which is hereby acknowledged, I, S. R. Thrasher, Sheriff as aforesaid, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said W. R. Bass all the estate, right, title and interest of the said Z. T. Howard in and to the following described premises, viz.;

(Here follows a full description of said land, being same as was set out in the pleadings in this cause.)

"To have and to hold the above described premises, unto the said W. R. Bass heirs and assigns, forever, as fully and as absolutely as I, as Sheriff as aforesaid, can convey by virtue of said writ of execution.

"In testimony whereof, I have hereunto set my hand, this 5th day of April, A. D. 1904.

S. R. THRASHER,
Sheriff of Gregg County,
Texas."

(5) The papers in said Justice's Court Case are lost.

(6) The execution issued on the judgment in the District Court Case was returned to said Court, and reads as follows:

Z. T. Howard was the owner of the fee simple title to this land prior to and at the date of the levy and of the execution sale mentioned in above deed. He died intestate in 1906. Litigants agreed that the two judgments and the executions mentioned in above deed were valid. This suit is a collateral attack upon the validity of this sale.

Appellants contend that said sale made under the execution issued out of the District Court is void, asserting that the sheriff of Gregg County did not levy on any land under said execution writ. This contention is without merit and is overruled. The indorsement on said District Court execution is as follows:

"Sheriff's Return.

"Came to hand 24th day of February, 1904, at 9 o'clock A. M., and executed on the 24th day of February 1904, by levying on the following described property to-wit: and on the 24th day of February, 1904, by advertising the same to be sold before the Court House door of Gregg County, Texas, on the first Tuesday in April, 1904, by an advertisement in the English language in the Times Clarion, a newspaper published in said County, once

a week for three consecutive weeks immediately preceding said sale. The first publication of which appeared on the — day of —— 1904, the same being not less than 20 days immediately preceding the day of sale; and on the first Tuesday in April, 1904, before the Court House door as aforesaid and within the hours prescribed by law for Sheriff's sales, I sold said premises at public vendue, when the sale were struck off to W. R. Bass for the sum of $31.28, he being the highest bidder therefor, and that being the highest accure bid for the same; and that after first satisfying the Sheriff's cost accrued under this writ, amounting to the sum of $10.35, an itemized bill of which appears below and the further sum of $..... original Court cost, the remainder being the sum of $20.53 being amount of execution and judg-
17 ment and the further sum of $6.28 being amount above judgment and costs was paid to P. N. Thomas, whose receipt for same is herewith presented, and this writ is hereby returned.

S. R. THRASHER,
Sheriff Gregg Co., Texas."

There are discrepancies between recitals in this return and in the deed. The return recites the sheriff made a levy but omits to include a description of the property levied upon. But the deed does recite that a levy was made and fully describes the property levied upon. The description of the land in the deed is the same as set out in the pleadings in this case. Bass, the purchaser, was a stranger to the execution creditors and the debtor. The agreed statement of facts recites that Bass paid the $103.00 bid by him and the sheriff applied same to the satisfaction of the execution and costs. Bass bought in good faith, paying a valuable consideration and believed he was getting a good title. In Howard v. North, 5 Tex. 290, the conclusion was reached that the title of a purchaser at an execution sale is not affected by irregu-

larities of the officer committed in making the sale where such irregularities have taken place, without the concurrence or participation of the purchaser. See also Riddle v. Bush, 27 Tex. 675; Whitney v. Krapf, 27 S. W. 843; Bryant v. Buckner, 67 Tex. 107, 2 S. W. 452; Griggs v. Montgomery, 22 S. W. (2) 688. The reasons for this rule are fully discussed in Coffee v. Silvan, 15 Tex. 354.

The foregoing rule was reaffirmed in Houston Oil Co. v. Randolph, 251 S. W. 794, in an opinion by the Commission of Appeals, adopted by the Supreme Court, wherein it is stated:

"It has long been a settled rule in this state that the indorsement of a levy and sale on the execution is not necessary to the validity of a purchaser's title acquired at the execution sale. The failure of the officer to make the proper indorsement cannot affect the rights of the purchaser acquired by virtue of the sale, when it is collaterally attacked and not questioned in a direct proceeding to seasonably have the sale set aside. Holmes v. Buckner, 67 Tex. 110, 2 S. W. 452; Fitch v. Boyer, 51 Tex. 336; Bank v. Land Co., 128 S. W. 436."

It becomes unnecessary to consider if said sale under the Justice Court execution is valid or not, because of the conclusions herein reached that the sale under the District Court is not void. Towne v. Harris, 13 Tex. 507; Crain v. Hogan, 16 S. W. 1019.

On April 9, 1904, four days after delivery of the sheriff's deed to Bass, he then being in actual possession, this purchaser under the execution sale conveyed the land without warranty to S. R. Thrasher. This deed into Bass and into Thrasher were filed for record October 6, 1904. In March 1905, by deed which went of record at that time, Thrasher conveyed the land to S. G. Smith. In

July, 1908, Smith with covenants of warranty conveyed to J. R. Castelberry, who in turn in January, 1911, with covenants of warranty conveyed the land back to Smith. These last two deeds went of record December 1, 1910, and March 14, 1919, respectively. It was agreed that each of above grantees purchased in good faith, paying a valuable consideration, and believed he was getting a good title. It was further agreed that Bass and those claiming under him have been in peaceable possession of this land, claiming same as their own since April 5, 1904, using and occupying the same continuously from that date to the time of trial, paying all taxes before they became delinquent; said possession being at all times open and notorious, visible and exclusive. That said land was fenced and cultivated each and every year from April 5, 1904, until 1931, and from 1931 the leaseholders in this suit have produced oil therefrom continuously. And during this period of time there were dwelling houses thereon occupied continuously and lived in from May 1, 1905, to 1933.

Under these facts, the five-year and the ten-year statutes of limitation (Arts. 5509 and 5510 of R. C. S. of 1925) urged by appellees were a complete bar to a recovery by appellants. The sheriff's deed and the other deeds mentioned each describes and at least purports to convey the land. Each deed upon its face is regular. Davis v. Howe, 213 S. W. 609; Rosenborough v. Cook, 108 Tex. 194 S. W. 131; Cantagrel v. Anna Von Lupin, 58 Tex. 570; T. J. p. 255. "It is not essential that there be any deed at all for perfecting of title under said ten years statutes." McAnally v. Texas Co., 76 S. W. (2) 997; Art. 5510, supra.

By various propositions grounded upon the contention that the sheriff's sale is void, appellants advance the theory that said statutes of limitation did not run in

favor of Bass and those claiming under him in that these purchasers (grantees named in above deeds) should be treated as mortgagees in possession or as constructive trustees. And that as such they were entitled to the possession of the land until reimbursed the amount bid for the land at the sheriff's sale.

18 Appellants advance the rule that equity will protect one, who without fault and in good faith, purchase property at a void or voidable execution sale, by requiring the execution debtor to refund the purchase price as a prerequisite to a recovery of the land. And in support of this doctrine cites the text in 25 R. C. L. pp. 1356, 1358, 1360; 16 R. C. L. p. 105; 60 C. J. p. 799, Sec. 109; Burns v. Ledbetter, 54 Tex. 374; Jasper State Bank v. Braswell, 111 S. W. (2) 1079, and other authorities not necessary to mention. If this equitable doctrine just stated, the purpose of which is for the purchaser's protection, is extended to prevent the running of the five, ten, and twenty-five years statutes of limitations, then the purchaser, whom the doctrine seeks to protect, will have less rights than a complete stranger or trespassor on the property. If appellants had timely prosecuted a suit to set aside this sale grounded on its being void or voidable and had been sustained in such suit, then the above equitable doctrine would be applicable.

If it be conceded that the execution sale is void and that Bass should be treated either as a mortgagee in possession or as a constructive trustees, still limitation would begin to run upon a repudiation of such assumed relationship. McCook v. Amerada Petroleum Corpn. 93 S. W. (2) 482, and authorities there cited; 2 T. J. p. 142, Sec. 74, and p. 150. The deed from Bass to Thrasher in April, 1904, which was recorded in October, 1904, together with the subsequent conveyances and their recordation and the uses and possession made of this land by

these grantees, all of a period of time more than ten years prior to the institution of this suit, was a sufficient repudiation of any such relationship as contended for by appellants.

Appellants' cause of action certainly accrued in December, 1910, if not before that time. Appellants in April, 1904, and during these subsequent intervening years have had the same right to sue and offer to do equity as a prerequisite to maintain the suit that they had at the inception of the present suit filed thirty years later. In the words of Justice Combs in Federal Crude Oil Co. v. Yount-Lee Oil Co., 73 S. W. (2) 969:

"We think it a sound proposition to say that a disability to sue, which is due wholly to the default of the person claiming its benefits and which at all times he had the power to remove, will not toll the running of the statutes of limitation. At any time during that period of time appellant had the right to revive its charter rights and resume all its corporate powers."

In support of this holding that Court cites 28 T. J. p. 140, Sec. 56; 17 R. C. L. p. 756, Sec. 121; Bamble v. Martin, 129 S. W. 386; Smith v. Wise Co., 187 S. W. 705; Port Arthur Rice Mill. Co. v. Beaumont Rice Mills, 105 Tex. 520, 143 S. W. 962.

The views here expressed dispose of all propositions advanced.

The judgment is affirmed."

XIII.

Plaintiffs further aver that in due course they filed in said Court of Civil Appeals their Motion for Rehearing

and as Grounds therefor assigned the error of said Court in holding that said suit was a collateral attack on the Sheriff's sale to Bass, and also assigned the error of the said Court in overruling each and all of said assignments of error filed by these plaintiffs there as herein before set forth, which Motion for Rehearing was filed in said Court on June 27, 1938, and copies thereof mailed to the opposing counsel on same day as required by the rules and that said Court overruled said Motion for Rehearing on June 30, 1938.

XIV.

Plaintiffs further aver that within 30 days after the Court of Civil Appeals had overruled said Motion for Rehearing, as aforesaid, these plaintiffs, as plaintiffs in error, filed in said Court of Civil Appeals their application to the Supreme Court of Texas for a writ of error to said Court of Civil Appeals in said case, and that in due course said application with the record in said cause and said opinion of the Court of Civil Appeals was filed in the Supreme Court of Texas, and said application was filed in docketed as Application No. 23,708, and styled Dora B. Hendron, et al, Plaintiffs in error vs. Yount-Lee Oil Company et al, Defendants in error;

19 that said application was in form required by law and the Rules of the said Supreme Court, and set forth the Grounds of Jurisdiction and the Assignments of error and propositions of law thereunder all to the effect that said Court of Civil Appeals had committed an error of substantive law in each of its said holdings, as is hereinafter set forth; that in response to these plaintiffs' said application, these defendants, as defendants in error in said Court, filed therein their Reply, in which, by Counter-Propositions, they made the same pretenses and contentions which they made in said Court of Civil Appeals; that said Supreme Court declined to take jurisdiction,

and refused said application without notation; that within 15 days thereafter these plaintiffs filed in said Supreme Court their Motion for rehearing of their application for writ of error, and therein again pointed out to said Court the various errors committed by said Court of Civil Appeals, as hereinbefore and hereinafter fully shown, and that said Supreme Court on the 2nd day of November, 1938, overruled said Motion for rehearing and thereby placed its seal of approval upon the holdings of said Court of Civil Appeals; that the action of the Supreme Court in refusing said application was merely an arbitrary and capricious exercise of power, and in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and thereby deprived plaintiffs of their property without due process of law, and its said act being peculiar to said litigation and contrary to that accorded others similarly situated, was a denial of the equal protection of the laws as is hereinafter shown.

XV.

Plaintiffs further aver that if said District Court had tried said cause No. 7018 according to the principles of law which have been established in our system of jurisprudence for the protection and enforcement of private rights, and had not acted arbitrarily and capriciously, it would have held that said sheriff's sale and deed to W. R. Bass passed no title, but that said Bass was subrogated to said judgment-creditors claims, and that he and his successors in title were mortgagees lawfully in possession of the land, and would have rendered judgment for plaintiffs; that if said Court of Civil Appeals, on the appeal of said case, had applied thereto those settled principles of law which have been established in our system of jurisprudence for the protection and enforcement

of private rights, and not substituted in lieu thereof their own autocratic edict, it would have reversed the judgment below and rendered judgment for the appellants; that if the Supreme Court of Texas, on the Application of these plaintiffs for writ of error to said Court of Civil Appeals, had considered the same in the light of those settled principles of law which have been established in our system of jurisprudence for the protection and enforcement of private rights, and had not arbitrarily and capriciously refused such application, it would have taken jurisdiction of said cause, and upon final hearing would have reversed the judgments below, and rendered judgment for the said plaintiffs in error. Plaintiffs further aver that the aforesaid acts of said State Courts are so gross as to be impossible in a rational administration of Justice, and are so plainly arbitrary and contrary to law as to be and are mere acts of spoilation, and in this connection plaintiffs further aver:

1.

That the holding of said Court of Civil Appeals that "This Suit is a Collateral Attack Upon the Validity" of the Sheriff's Sale to W. R. Bass, is merely an arbitrary edict clothed in the form of a judicial sentence; it is, in truth and in fact, a fraud upon the rights of these plaintiffs, and was so made by said Court with the deliberate intent to and it did discriminate against the appellants and favor the appellees, and in this connection plaintiffs aver:

(a) That prior to April 5, 1904, two valid judgments were entered against Z. T. Howard; one in the District Court of Wood County, the other in a Justice's Court in said County, and valid executions on each were placed in the hands of the sheriff of Gregg County for execution. The sheriff allegedly acting under said two executions, sold the land of the judgment debtor to W. R.

Bass on April 5, 1904, who purchased in good faith, and whose purchase money discharged both judgments. The sheriff's sale under the Justice's Court execution was made after the return date thereof. The execution from the District Court shows upon its face that No Levy on any land was indorsed thereon, but the deed from the sheriff to Bass recites that he had made a levy. These plaintiffs brought said suit in the said District Court of Wood County, against the defendants, seeking to set aside, as Absolutely Void, not voidable, said execution sale, and alleged that defendants, holding by mesne conveyances from and under said W. R. Bass were holding possession of the land of trustees or mortgagees in lawful possession, and that they be required to account for the rents and profits of the land, and offered to redeem the land from the debt evidenced by said two judgments, and to do and perform such equities as the Court might order and decree, and prayed that they be placed in possession of the land and for general relief; in short, these plaintiffs contended therein that inasmuch as they were not claiming that the sheriff committed a Mere Irregularity in selling the land under the Justice Court execution after the return date thereof, or in selling the land under the District Court execution without levying on same, but that said sheriff *had no power* to sell said land, and, consequently, said sheriff's sale and conveyance is void, and Bass acquired no title to the land under his said purchase, but *that, by reason of his good faith and the payment of the purchase money and its application in discharge of said judgment-creditors' claims*, he was subrogated to the claims of said judgment creditors, and having, under his said purchase entered into the actual possession of the land, held same as security for his debt, and occupied the position of a trustee under a continuing trust or a mortgagee lawfully in possession with the right to hold such possession until reimbursed. The reply of the defendants was that (a) the sale of said

land by the sheriff under the Justice's Court execution after the return date thereof, and (b) the sale of said land under the District Court execution without making a levy on the land, were *mere irregularities* of the said sheriff in making said sale, and therefore plaintiffs right to make a direct attack on said execution sale is barred by the four-year statute of limitations, and the suit must be treated as a collateral attack upon such sale.

(b) That a proceeding which has for its purpose the setting aside of a void sheriff's sale under a valid judgment and execution, and to redeem the land sold from the purchaser at such void sale who is in possession constitutes a direct attack upon the sale; in short, such relief could not be had in a collateral attack, such as trespass to try title, ejectment, etc. (19 R. C. L. sec. 105 p. 330); Moreover, a direct attack is a proceeding to vacate etc., a judgment or deed, while a collateral attack on a judgment or deed is an attempt to avoid its force in a proceeding not instituted for that purpose, as in a suit to try title (Crawford v. McDonald 33 S. W. 327).

(c) That said Court of Civil Appeals, in the course of its opinion, and in support of its said holding, quoted the following excerpt from the case of Howard v. North, 5 Tex. 290,316, to-wit: "In Howard v. North, 5 Tex. 290, the conclusion was reached that the title of a purchaser at an execution sale is not affected by *irregularities* of the officer committed in making the sale where such irregularities have taken place, without the concurrance or participation of the purchaser," when said Court well knew that the doctrine quoted above had no application to the case, because it was not contended that the officer committed a mere irregularity in making the sale, but that the sale was absolutely void because the officer had no power to sell, and that said Court deliberately ignored

the settled principle announced in the same case of Howard v. North, which reads:

"the purchaser at an execution sale is not bound by nor is his purchase affected by irregularities of the officer committed in making the sale, where such irregularities have taken place without the concurrence or participation of the purchaser; *but a clear distinction is recognized to exist between a sale without authority and one where there is authority not strictly pursued. In the former case the sale is void; in the latter the title will pass, and the party injured by the irregularities will be left to his remedy against the officer;*" and that "*where an execution sale under a valid judgment is void, and the debtor* brings suit to recover the property, if there be no fraud on the part of the purchaser the latter will not be required to restore possession without being reimbursed the amount which he paid and which went to discharge the judgment."

In that case the suit was brought by the defendants in execution to set aside a sheriff's sale and annul his deed, under which the purchaser held title to the land. And the decision was based on the principle that a Court of equity would not aid the defendants in execution to regain possession and title to their land from a purchaser who had committed no fraud, without requiring
21 them to do equity by refunding the money paid to their use, and the Court further held that in such case "*the purchaser will be treated as a trustee, and he will not be compelled to surrender until equity is done him.*" (Italix mine) 5 Tex. 316.

(d) That the principle announced by the Court in Howard v. North, that "A clear distinction is recognized to exist between a sale without authority and one where there is authority not strictly pursued," has been affirmed

and reaffirmed by an unbroken line of decisions from that date down to the present time; that such is "due process" in this and all other jurisdictions.

(e) That it is well settled by the decisions of the Courts of this State that the plaintiffs have a *continuing right* to redeem the land from the judgment creditors' claims which have not been foreclosed, as well as to remove a cloud cast on their title by the claims of the defendants holding under said void execution sale, so that neither the doctrine of stale demand, the four-year statute of limitations, nor the statute of limitations applicable to actions to recover real property are applicable to them. That the above doctrine was announced and applied by the Supreme Court of Texas in the case of Garza v. Kenedy, 299 S. W. 231,233, and has been followed consistently since then; that this doctrine was announced and applied in the very recent case of White Point Oil and Gas Company v. Dunn, 18 S. W. (2) 267, 272, where it is said:

"15. In reply to the 22nd and 23rd propositions, we say, this being a suit for the removal of a cloud from the title cast thereon by certain void instruments, and the cancellation of such instruments being the means of removing such cloud, and the recovery of the property involved being an incident and result of the removal of such cloud on said land, neither the four-year (Rev. St. 1925, art. 5529) nor the ten-year, (Rev. St. 1925, art. 5510) statutes of limitation are shown to be applicable."

(f) The said Court, in making such holding, well knew that no authority sustained it; that it was contrary to all authority; that they intentionally ignored the principle announced in Howard v. North applicable to the case, and deliberately announced a principle not applicable to the case with the intent to camouflage the issue, and favor

said appellees, and discriminate against said appellants; that its said act in so holding if not an actual fraud, is a constructive fraud, and if not an actual or constructive fraud, it is a legal fraud; that as hereinafter shown its judgment of affirmance was based solely upon such fraudulent holding that said suit was a collateral attack on said sheriff's sale.

(g) That even if said suit was a collateral attack, it being alleged and shown that said sheriff's sale was void, not voidable, there could be no presumptions in support of the sheriff's deed, because "when facts appear, presumptions disappear." A void judgment (or deed) has no legal affect, and running of limitations will not give it any validity (Mote v. Thompson, 156 S. W. 1105).

(h) That said Court in making said holding not only deprived plaintiffs of their property without due process, as above shown, but also, denied them the equal protection of the laws, in that such holding was peculiar to said litigation and contrary to that accorded to others similarly situated, as hereafter more fully shown; that in assuming a state of facts that did not exist; i. e. a defective levy where there was "no levy," and misquoting an authority, viz, Howard v. North, said Court clearly shows a studied intent to affirm said judgment irrespective of both law and fact, which it did.

(i) That said holding was and is the result of fraudulent conduct on the part of the Justices of said Court and the defendants, as above shown, and hereafter more fully shown.

2.

That the holding of said Court *that the omission of the sheriff to indorse a levy on the writ of execution is cured*

by a recital in his deed that he had made a levy on the land, and that a sale by a sheriff without levy passes title is merely an arbitrary and capricious exercise of power, and in clear conflict with those fundamental principles which have been established in our system of jurisprudence in respect to the power of an officer to sell real estate under a money judgment execution; that such holding discriminates against plaintiffs and favors de-
22 fendants, and is peculiar to that litigation and contrary to that accorded to others similarly situated, and constitutes a fraud upon plaintiffs, and in this connection, and for the purpose of showing what is due process of law in respect to the matter, plaintiffs further aver:

(a) That the Controlling Statutes of Texas in respect to execution sales are as follows:

Art. 3788, St. 1925, provides that:

When an execution against the property of any person is issued to an officer, he shall proceed without delay to levy the same upon the property of the defendant not exempt from execution, unless otherwise directed by the plaintiff, his agent or attorney.

Art. 3793, St. 1925, provides that:

In order to make a levy on real estate, it shall not be necessary for the officer to go upon the ground, but it shall be sufficient for him to indorse such levy on the writ . . .

That the statutes of Texas provide no other mode for making a levy on real estate; that these statutes were enacted in 1879 (arts. 2286 and 2290), and readopted without change in 1895 (arts. 2343 and 2348), and readopted without change in 1914 (arts. 3734 and 3739),

and readopted without change in 1925, and have been construed many times since 1879 by the Supreme Court of Texas; that in Sanger v. Trammell, I. S. W. 378, the Supreme Court, in reference to the question, said:

"Whatever other acts may be performed by the sheriff in making the *levy, the indorsement* upon the execution or attachment must take place before the levy is completed. All other steps are unnecessary, and none of them by force of the laws can give validity to *a levy not accompanied by indorsement.*

That in Hayes v. Gallaher, 51 S. W. 280, writ of error denied by the Supreme Court, it was expressly held that before the sheriff could be empowered to sell the land, he *must have made a valid levy on it, and the recital of a levy in the deed that the land sold had been levied on, cannot cure the want of a levy.*

That in Smith v. Crosby, (Court of Civil Appeals) 22 S. W. 1042, Chief Justice Garrett, considering the question, says: "That in execution sales the levy indorsed on the execution, and notice of sale thereunder, must contain a sufficient description; and *the description in the sheriff's deed cannot be looked to in aid of the levy, because it was written in after the sale.****The earlier decisions of our Supreme Court were not so strict with regard to the description to be contained in the levy, and seemed to attach more importance to that contained in the deed. Coffee v. Silvan, 15 Tex. 354; Alexander v. Miller, 18 Tex. 893. *But it now well settled that the levy itself should contain a description sufficient to identify the land that was sold by the sheriff.*" The above case was affirmed by the Supreme Court in Vol. 23 S. W. 10.

That it is well settled that the title of a purchaser of land at a sheriff's sale does not depend upon the deed.

It rests upon a valid judgment, *levy* and execution sale and the payment of the money. (See 18 T. J. sec. 173, p. 742 for collection of cases so holding).

That it is likewise well settled that no lien attaches to land until the indorsement of the levy. (Redlick v. Williams, 5 S. W. 375, applying doctrine down in Sanger v. Trammell, supra).

That is well settled that "When the legislature re-enacts a statute which has been construed by the Courts, the presumption is that it is intended that the new enactment should receive the same construction as the old." That the above quotation is from the case of Kountze v. Cargill, 25 S. W. 13, 15, and the doctrine is laid down in 39 T. J. sec. 141, p. 266. That in consequence of said construction and the reenactment thereof without change, made such interpretation a part of the statute as fully to all intents and purposes as if incorporated therein; that it is well settled rule that "when the words used in a statute clearly express the will of the legislature, Courts are not at liberty to give a construction changing the meaning of the law making department." That it is elementary that Courts can not make laws—it is their duty to construe them; that there were fixed rules with respect to the question, and consequently said Court had no discretion; that "discretion" implies that, in the absence of positive law or fixed rule, the Judge is to decide by his view of expediency or the demands of equity and justice; that said Court, in making said holding, thus set at naught the "positive law and settled rule" and applied in lieu thereof its own autocratic will.

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(b) That there is a decided distinction between the levy of an officer and his return; the former preceds and justifies the sale; the latter is simply a report of the sale; the former is mandatory and the latter is not.

(c) That the authorities cited by the Court as sustaining its said holding, viz: Howard v. North, 5 Tex. 290; Coffee v. Silvan, 15 Tex. 354; Riddle v. Bush, 27 Tex. 675; Whitney v. Krapf, 27 S. W. 843; Bryant v. Buckner, 2 S. W. 452; Griggs v. Montgomery, 22 S. W. (2) 688, are not in point; that in none of said cases was there *a lack of levy* as in the instant case; that in each of said cases so cited the question was as to the sufficiency of the description contained in the levy; that in Coffee v. Silvan, the levy was on "nine lots in the town of L." And the description was held sufficient. That in Riddle v. Bush, decided in 1864, the question was to the sufficiency of the description indorsed on the writ. In Whitney v. Krapf, the sheriff indorsed his levy on the writ and the question was as to its sufficiency.

In Bryant v. Buckner, 2 S. W. 452, cited by the Court and relied on by defendants, a collateral attack was made on a sheriff's sale under an execution, because the return of the sheriff shows the sale was made in July, while the deed shows that the sale as made in June. There was no contention there that "no levy" on the land sold had been made by the officer, and the Court remarked "This was a mere defective execution of a valid power,—an irregularity which might have set aside the sale if presented at a proper time, in a proper manner and by the proper person,—but did not subject it to collateral attack. This principle is now so firmly settled by numerous decisions of this Court as to be no longer a subject of discussion." The case of Griggs v. Montgomery was also a collateral attack on the sufficiency of the description of the land levied on.

(d) That the doctrine laid down in Coffee v. Silvan, 15 Tex. 354 was expressly repudiated by the Supreme Court in Smith v. Crosby, supra; Sanger v. Trammell, supra; Hayes v Gallaher, supra; Redlick v. Williams,

supra, all holding that without a levy indorsed on the writ, the officer has no power to sell.

(e) That it is elementary that in execution sales of real estate "due process" is not accorded unless a levy on the land to be sold is indorsed on the writ as required by statute, and in such case the Courts have no discretion to hold otherwise.

(f) That the effect of said holding is to deny to plaintiff the equal protection of law, for that, such holding was peculiar to said litigation and contrary to that awarded others similarly situated as above shown.

(g) That said holding was intended to and did take plaintiff's property and give it to defendants contrary to the settled modes of procedure in respect to cases of that kind.

(h) That said holding was the result of fraudulent conduct between the Justices of said Court and defendants.

3.

That the Court, in its opinion, says "*It becomes unnecessary to consider if said sale under the Justice Court execution is valid or not, because of the conclusions herein reached that the sale under the District Court is not void,*" and in this connection, plaintiffs aver that it is conclusively shown by the sheriff's deed to Bass that the execution was issued by the Justice's Court on or prior to the 22nd day of January, 1904, and the sale by the sheriff thereunder was made on the 5th day of April, 1904; that it is now and was at the time said execution was issued and said sale was made, the statutory law that a Justice Court execution shall be returnable in

sixty days, (see art 2445, acts of 1876); that it is settled by an unbroken line of decisions in this State
24 that an execution sale of real property made after the return date of the execution, is void (See Tanner v. Grisham, 295 S. W. 590, Opinion adopted and approved by Supreme Court, and cases cited.)

4.

That the holding of said Court that *plaintiffs' claim to said land was barred by the five*and ten year**statute of limitations, is* merely an arbitrary and capricious exercise of power and in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights; that such holding discriminated against plaintiffs and favored defendants, and is peculiar to said litigation and contrary to that accorded to others similarly situated, and not only deprived plaintiffs of their property

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*Art. 5509. Five Years' Possession—Texas Statutes 1925.

Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article.

**Art. 5510. Ten Years' Possession—Texas Statutes 1925.

Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument.

without due process of law, but also denied them the equal protection of the laws, and constitutes a fraud upon plaintiffs rights, for that, under due process of law, neither the five or ten-year statute of limitations of the State of Texas, are applicable to an equitable trustee or a mortgagee in lawful possession of land, as is hereinafter shown; and that the said holding that the said statutes of limitation are applicable to W. R. Bass and/or his vendees is a denial to plaintiffs of the equal protection of the laws, and in this connection plaintiffs further aver:

(a) That it being shown that W. R. Bass purchased said land at said sheriff's sale in good faith, believing that he was getting title and his purchase money was applied in extinguishing the judgment creditors' claims, he was under well settled rules, subrogated to the "rights and securities of the creditors whose claims were discharged against the property sold, and the same rights extends to the assignee or grantee of one who purchases at a void judicial or executive sale." This doctrine is laid down in all the books, see 25 R. C. L. p. 1356, sec. 40; 16 R. C. L. p. 105, 104; 60 C. J. p. 799, sec. 109, and has been adopted in Texas, see Howard v. North, 5 Tex. 290,316, which is the leading case.

(b) That said W. R. Bass having purchased said land at a void execution sale, in good faith believing that he was getting title, and his purchase money having discharged the judgment-creditors' claims for which said land was sold, he was the equitable assignee of their rights and claims, and subrogated to their rights, and having entered into the actual possession of said land, he was under the well established rules rightfully in possession, as an equitable trustee or a mortgagee in possession, with the corresponding right to retain such until equity was done him, and in duty bound to account

for the rents and profits of the land which doctrine is laid down in all the books, and beginning in 1849, with Howard v. North, 5 Tex. 290, 316, it is held by an unbroken line of decisions that in cases such as this, the purchaser it a void execution sale, or his vendee, will be treated as a trustee or a mortgagee in lawful possession, and in duty bound to account for the rents and profits and will not be compelled to surrender possession until reimbursed the amount he paid with legal interest thereon, taxes paid and costs of necessary improvements.

(c) That it is a well established rule that said Bass, being the assignee of said judgment-creditors' claims, could have had executions re-issued on said judgments and caused the land to be legally sold and thus acquired title to the land; that under the law said Bass or any of his vendees could have done this at any time before said judgments were barred by limitation.

(d) That under the well settled rules said Bass had the right of possession for the purpose of securing his debt; that the taking of possession is one of the means recognized by law in securing the debt.

(e) That said Bass, being lawfully in possession of the land, the owner had the right to redeem the land, at any time, by doing equity (Howard v. North and cases following it).

(f) That said Bass being in possession of said land, holding a lien thereon, and as a trustee in equity, or a mortgagee in lawful possession, he could not, under the well settled rules be a limitation claimant to said land; that this doctrine is well established see Vol. 1 R. C. L. p. 749, where it is said "The possession of a mortgagee

is not considered hostile to the interests of the mortgagor during the continuance of the relationship of mortgagor and mortgagee." and in 27 Cyc. p. 1237 the doctrine is thus stated: "Although his possession is not one which can ripen into an adverse title, it is his unquestionable right to retain the possession so gained until he has received full satisfaction of his mortgagee debt." And the same doctrine is stated by the Supreme Court of Texas in Howard v. North, 5 Tex. at 316, where it is held that a purchaser at a void execution sale "will be treated as a trustee, and he will not be compelled to surrender *until* equity is done him." That the word "until" as used by the Courts is a restrictive word; a word of limitation, and points out the period of time, in which his possession is legal, and not adverse.

(g) That it a well settled rule of law that Bass and his vendees had the right to retain possession until the debt is paid, even though the debt is barred by limitation; that is the emphatic holding of the Supreme Court of Texas in Jasper State Bank v. Braswell, III S. W. (2) 1079; that in said case last cited, said Court further held that "While the trust relation continues, a trustee will not be permitted to plead limitations against the cestui que rust." That this doctrine, thus stated by the Supreme Court, in the last cited case, is in entire accord with the general rule as stated in Corpus Juris, Vol. 37 p 906, that the only class of trusts not affected by the statute are, in the language of Chancellor Kent, "*those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of Court of equity.* Therefore, whenever there is an adequate, concurrent remedy at law, the statute will apply, although relief is sought in equity; and the statute will run from the time the cause of action first accrued." That it is also well settled that plaintiffs nor their ancestor could have brought a trespass

to try title suit or in ejectment or to quiet their title against Bass or his vendees, this doctrine is stated in 19 R. C. L. p. 300, viz: "Ejectment will not lie by the mortgagor against a mortgagee in possession, so long as the mortgage subsists. Nor will an action of trespass to try title, a suit for partition, or an action to quiet title. The rule is unaltered by the circumstances that the obligation secured and the right to foreclose are barred by the statutes of limitations. The debt cannot be paid by mere lapse of time."

(h) That it is elementary that for execution sale deed to be effective as conveying title, power to sell must be shown, by putting judgment, execution, and levy in evidence; that said judgment, execution, and levy constitutes *the links* in said W. R. Bass' title to said land; that said Bass and his vendees were charged with the knowledge that (1) said sheriff's sale under said Justice Court execution was made after the return date of said execution, and (2) that said sheriff did not levy on *any* land under said District Court execution, hence, they are not and cannot be innocent purchasers for value and without notice. That the rule is elementary so says Mr. Storey that "if we advert to the authorities on the subject, we shall find that trusts are enforced not only against those persons who are rightfully possessed of trust property, as trustees, *but also* against all persons who come into possession of the property bound by the trust, with notice of the trust. And whoever so comes into possession is considered as bound, with respect to that special property, to the exception of the trust." I Storey's Eq. sec. 533. This principal was applied by the Supreme Court in Howard v. North, 5 Tex. 316, where land was sold under an execution admittedly void, but the purchaser bought in good faith, believing that he was getting the title and his purchase money went to

discharge the judgment, and in treating of the
26 rights of such purchaser and *his vendee*, the Court said: "The purchaser of property sold under execution has a right in equity, where the property is recovered from him *or his vendee* by virtue of a superior title, to be substituted for the creditor, and have the amount of the purchase money refunded to him by the defendant in execution. His equity rests not upon the want of knowledge as to title in the property, but on the ground of his having discharged a judgment against the defendant, for which he stood chargeable by a purchase made under the coercive process of law, and therefore has an equitable claim to reimbursement by the defendant in execution." That principle has been applied many times by the Courts of this and other jurisdictions, thus in Jones v. Smith, 55 Tex. 383, the Supreme Court of Texas applied the principle, saying: "if he (the purchaser) of *his vendee* was in possession, the appellant could not disturb that possession until they had been refunded the money paid by him in discharging the judgment." That said principle was applied by the Court of Civil Appeals for the Sixth District in the case of Alford v. Cole, 65 S. W. (2) 813, where it is said: "And the jury further found that appellant at the time he took a special warranty deed from Bulloch, Ramsey & Storey had notice that they only held a mortgage lien. Appellant, then, acquired no title to the land and at best only became *a transferee of the mortgage lien.* His subsequent transfer to, and repurchase from appellee's father, Geo. Cole, did not place appellant in any better position, because George Cole admitted that he had knowledge of the facts constituting the deed a mortgage. 'Once a mortgage it remains a mortgage,'" and appellant could not acquire title under the instrument, except by estoppel as a purchaser for value and without notice." This same doctrine was applied in the case of Elliott v. C. C. Slaughter Co. 236 S. W. 1114, and has been quoted many times

by the Supreme Court with approval, viz: "Under the state of facts existing in the case and the law as thus declared, Slaughter should be regarded as a mortgagee in possession and the mortgagor and those holding under him would not be permitted to recover the land without payment of the mortgage indebtedness. Duke v. Reed, 64, Tex. 605; Northcraft v. Oliver, 74 Tex. 162, II S. W. 1121; Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 299; Baker v. Collins, 4 Tex. Civ. App. 520, 23 S. W. 493; Kaylor v. Kelsey, 91 Neb. 404, 136 N. W. 54, 40 L. R. A. (ns) 839 and note; Jones on Mortgages (6th ed) par. 716. *The conveyance from Slaughter to the Slaughter Company operated as an assignment of Slaughter's rights under the mortgage, though the mortgage and debt were not mentioned in the deed.* Rodriguez v. Haynes, 76 Tex. 225 13 S. W. 297 (6); Fidelity & Deposit Co. v. Albrecht, 171 S. W. 820; R. C. S. art. 1105; Kaylor v. Kelsey, supra; Bropst v Brock, 10 Wall. 519, 19 L. ed. 1002; Johnson v. Sandoff, 30 Minn. 197, 14 N. W. 891; Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 700; Jordon v. Sayre, 292 Fla. 100, 10 So. 823; Jones on Mortgages (6th ed.) 808." The case of Cooke v. Cooper, referred to last above, is a leading case on the question, and in applying the principle, say: "The findings, in effect, show that there was an attempted foreclosure, followed by a sale of the property; that such sale was approved by the Court, and a proper deed executed to Boeschan, the plaintiff and mortgagee, who became the purchaser at the sale and entered into the possession by virtue of said deed. He subsequently sold his interest in said premises, which passed with possession thereof by mesne conveyance to George Cooper, who erected the house thereon. *These conveyances, if they failed to pass the* title to the lots described, *operated as an assignment of Boeschan's mortgage to the successive grantees named in said* several deeds. (citing cases.) If the Boeschan mortgage was not foreclosed, it remained in

full force and unsatisfied, and by the conveyances set out in the findings was owned by George Cooper at the time he placed the erections on the lots, and in such cases his relation to the lots was that of a *mortgagee in possession.*" And in Kaylor v. Kelsey, (Neb.) 136 N. W. 54, 40 L. R. A. (ns) 839, it is said: "One who takes possession under a mesne conveyance from a purchaser at a void foreclosure sale under a valid mortgage is entitled to the rights of a mortgagee in possession."

(i) It is well established that, although the deeds from Bass to Thrasher, from him to Smith, from him to Castelberry and from him to S. G. Smith, were in form absolute conveyances, yet to serve as a basis for the five year statute of limitation, the instrument relied on should be, as to the party pleading it, in truth and in substance as well as in form, an absolute deed and it being conclusively established that each of said vendees were charged with knowledge that Bass had no title, but simply a lien thereon with the right of possession, they cannot be regarded as in the attitude of an innocent purchaser or third party, and cannot invoke for their pro-
27 tection the form of the instrument under which they held possession and claimed the land. This principle was announced in the case of Massie v. Meeks, 28 S. W. 44, writ of error denied by Supreme Court, and in Alford v. Cole 65 S. W. (2) 813; Rio Bravo Oil Company v. Sanford, 217 S. W. 218, writ denied, and in many others.

(j) That such holding is supported by no decision, and is contrary to the established principles in respect to such matters, and is the result of fraudulent conduct of the Justices of said Court and defendants.

5.

Said Court in its opinion say: "Appellants advance the rule that equity will protect one, who without

fault and in good faith, purchase property at a void or voidable execution sale, by requiring the execution debtor to refund the purchase price as a prerequisite to a recovery of the land. And in support of this doctrine cites the texts in 25 R. C. L. pp. 135, 1358; 1360; 16, R. C. L. p. 105; 60 C. J. p. 799 sec. 109; Burns v. Ledbetter, 54 Tex. 374; Jasper Bank v. Braswell, 111 S. W. (2) 1079, and other authorities not necessary to mention," and holds that "*If this equitable doctrine just stated, the purpose of which is for the purchaser's protection, is extended to prevent the running of the five, ten, and twenty-five years statutes of limitation, then the purchaser, whom the doctrine seeks to protect, will have less rights than a complete stranger or trespasses on the property,*" and in this connection plaintiffs aver:

(a) That had the land here involved turned out to be Dry, the Court would have recognized the settled doctrine it so arbitrarily and capriciously refused to apply.

(b) That the defendants having entered under the Bass' title, cannot assert the protection afforded a naked trespasser or third party.

(c) That it is well settled that "The doctrine of subrogation will be applied in favor of a defendant who has not invoked the same, where to fail to do so, must result in granting to the complainant greater equities than he has shown himself entitled to." See Montague & Co. v. Ayzarn, 164 Ill. App. 696; Gilbraith & F. Lbr. Co. v Long, 5 S. W. (2) 162.

(d) That "due process" required the Court to apply the doctrines announced in the above texts, and not its own autocratic edict.

(e) That said Court had no right of discretion, but was bound to follow the law, as laid down in the texts, and its said holding is merely an arbitrary and capricious exercise of power.

(f) That by such holding said Court not only deprived plaintiffs of their property without due process of law, but also denied them the equal protection of the laws.

(g) That such holding was and is fraudulent, in that it is the result of a collusion between said Court Justices and defendants, and clearly illustrates an intent to affirm said judgment irrespective of law and fact.

6.

Said Court, in its opinion, said: "If it be conceded that the execution sale is void and that Bass should be treated either as a mortgagee in possession or as a constructive trustee, still limitation would begin to run upon a repudiation of such assumed relationship. McCook v. Amerada Petroleum Corpn., 93 S. W. (2) 482 and authorities there cited; 2 T. J. p. 142, Sec. 74 and p. 150." and held that *"The deed from Bass to Thrasher in April, 1904, which was recorded in October, 1904, together with the subsequent conveyances and their recordation and the uses and possession made of this land by these grantees, all of a period of time more than ten years prior to the institution of this suit, was a sufficient repudiation of any such relationship as contended for by appellants,"* and in this connection plaintiffs aver:

(a) That the situation of Bass' and his vendees is not that of tenants in common, or joint tenants, like the parties were in the McCook Case supra.

28 (b) That it is well established that Bass' and his vendees were lawfully entitled to the possession to secure their debt against the land; that it is fundamental, as heretofore shown they had the right to transfer the debt, lien and right of possession.

(c) That such holding is, of itself a badge of fraud.

(d) That such holding is merely an arbitrary and capricious exercise of power.

(e) That such holding is peculiar to said litigation and contrary to that accorded others similarly situated.

7.

That it was the duty of the defendants to show the rents and profits received and expenses incurred, and not having shown any rents and profits prior to 1931, the conclusion is that there were none prior to said date (Harrison v. Ilger, II S. W. 1054).

8.

That it is a well settled rule that a mortgagee in possession after having received payment of his debt, will not be protected by the statute of limitations, unless it be shown that he had held it adversely to the mortgagor for the period which limits recovery of the land. The relation is analogous to that of a trustee, and cestui, and the possession of either is not, as to the other, adverse (Green v. Turner, 38 Iowa 112; Norris v. Scroggins, Ark. 297 S. W. 1022). That the plaintiffs were under no duty to bring suit to redeem the land until the rents and profits of the land had satisfied the debt, and this did not occur until 1931.

10.

That it is a well settled rule that in cases to redeem land from a void judicial or execution sale, the plaintiff and not the defendant must pay the costs, but an exception to the rule is where the defendant sets up an unwarranted or unconscientious defense, and thereby makes costs and delay (Turner v. Johnson (Mo.) 6 A. S. Rep. at 72; Brockmay v. Wells, I Page 618; Haley v. Jones, 25 S. W. 696; Hayes v. Gallaher, 51 S. W. 280, awarding costs in favor of plaintiff.

11.

That it is well settled "that where one is subrogated to the securities held by the creditor he is not entitled to recover the rate of interest expressed in the judgment or note which is the evidence of the debt, the amount of payment made, with legal interest, is the measure of recovery (Faires v. Cockrill, 31 S. W. 194 and cases cited). That in such case he is also entitled to taxes paid and expense of necessary improvements (Majors v. Strickland, 195 S. W. 964).

XVI.

Plaintiffs aver that they do not contend that the State of Texas, so acting by its aforesaid Judicial departments, committed mere errors of law in respect to the matters aforesaid, but charge that said Courts, in so doing, acted fraudulently, and with an "evil eye and uneven hand," and not judicially, and that their aforesaid acts are merely an exercise of arbitrary and capricious power, and in clear conflice with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and that their said conduct and acts was peculiar to said

litigation and contrary to that accorded others similarly situated, and that they deliberately and intentionally awarded plaintiffs property to the defendants without consideration, and thereby not only deprived them of their property without due process of law, but also denied them the equal protection of the law as heretofore shown, and by reason thereof United States Constitution, 14th Amendment was violated.

29 XVII.

Plaintiffs aver that the defendants having obtained the title of plaintiffs property in the manner hereinbefore set forth, and are holding and claiming same in virtue of the aforesaid judgment of the State Court, should be decreed to hold same as trustees for the plaintiffs, and required to convey same to plaintiffs, and account for the rents and profits of the land since April 5, 1904, less their proper offsets, and plaintiffs now offer to do and perform such equities in respect to the matters aforesaid as this Honorable Court may order and decree.

Wherefore plaintiffs demand:

(1) That a trust be engrafted on said judgment in favor of plaintiffs, and that they be permitted to redeem by doing equity.

(2) That defendants be required to account for the rents and profits of said land since April 5, 1904.

(3) That in event such account shows an indebtedness due by defendants over their just offsets, then plaintiffs have judgment for such sum of money as is found due them.

(4) That plaintiff recover their costs.

(5) That plaintiffs have such other and further relief as is just.

TUCK CHAPIN,
San Antonio, Texas.
D. B. CHAPIN,
Mission and Tyler, Texas.
Per D. B. CHAPIN,
Attorneys for plaintiffs.

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30 (Title Omitted.)

And now comes the plaintiffs in the above entitled and numbered cause and with leave of the Court, amends their bill of camplaint by adding to paragraph x thereof the following allegations, to-wit:

That after said briefs had been filed as aforesaid, the said appellees and their counsel well knew that under the cold logic of the law each of the aforesaid assignments of error would be sustained and the judgment reversed and rendered for these plaintiffs and that the Supreme Court of Texas would refuse a writ of error therein, and with the intent to defraud these plaintiffs out of their property, then and there conspired, agreed and confederated together to and they did attempt to camouflage the issues in the case, as is hereinafter more specficically shown, so as to form a basis or background upon which the said Court of Civil Appeals apparently could and would affirm the judgment below and the Supreme Court of Texas refuse a writ of error, and thereby and by reason thereof acquire plaintiffs property without consideration, which as hereinafter shown, they did.

That as hereinafter shown said appellees filed in said Court of Civil Appeals their counter-propositions in response to these plaintiffs said assignments of error, as aforesaid, in which they intentionally misstated both fact and law, with the intent aforesaid, and as hereinafter

shown the Judges of said Court of Civil Appeals and of the Supreme Court of Texas connived at such
31 fraudulent conduct on the part of said appellees and upon their instance and demand ignored the settled rules of law in respect to the admitted facts, and acting solely upon such pretentions and contentions of said appellees, as hereinafter set forth, refused these plaintiffs any relief, and thereby gave plaintiffs property to the defendants without consideration.

Respectfully submitted,

(Signed) B. D. CHAPIN,

(Signed) TUCK CHAPIN,

Attorneys for plaintiffs.

Filed June 15th, 1939.

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32 (Title Omitted.)

Come now Stanolind Oil and Gas Company, Yount-Lee Oil Company, and S. G. Smith, Defendants in the above styled and numbered cause, before answering Plaintiffs' petition herein, and file this their Motion to Dismiss Plaintiffs' petition for failure to state a claim on which relief can be granted by this Court. Defendants offer the following reasons in support of their Motion:

I.

Plaintiffs allege no facts to support their conclusion that the State Courts in Dora B. Hendron vs. Yount-Lee Oil Company, et al, (No. 7018) denied them their legal and constitutional rights and therefore no ground for equitable relief is now before this Court.

II.

This cause should be dismissed because the face of the Bill shows it to be an attempt to appeal from a final judg-

ment of the Supreme Court of Texas to this Honorable Trial Court, which has only original jurisdiction of causes, all appellate jurisdiction from the State Supreme Court being lodged in the United States Supreme Court.

33 III.

Plaintiffs' petition should be dismissed as a collateral attack on the respective State Court judgments in the case of Hendron vs. Yount-Lee, it appearing from the allegations therein that before this Court could grant the ultimate relief prayed for it would first have to set aside the judgments of the District Court of Wood County, the Court of Civil Appeals and the Supreme Court of Texas.

IV.

Plaintiffs' petition should be dismissed because from its own averments it appears that the matters complained of with respect to the execution and sale and sheriff's deed of 1904 have been fully and completely adjudicated by the State Courts of Texas in the case of Dora B. Hendron, et al, vs. Yount-Lee Oil Company, et al.

Wherefore, these Defendants pray that Plaintiffs' petition herein be dismissed and that Defendants be discharged with their costs.

(Signed) GEORGE PRENDERGAST,
Attorney for S. G. Smith.

(Signed) WRIGHT MORROW,
Attorney for Yount-Lee Oil Company.

(Signed) TURNER, RODGERS, WINN & SELLERS,

(Signed) By GEORGE TERRY,
Attorneys for the Defendant Stanolind Oil and Gas Company.

Filed: Mar. 23, 1939.

34 (Title Omitted.)

Now comes Sun Oil Company, one of the defendants in the above numbered and entitled cause, and adopts as its Motion to Dismiss, and in the alternative, for summary judgment, the motion heretofore filed by Turner, Rodgers, Winn & Sellers, on behalf of Yount-Lee Oil Company and Stanolind Oil & Gas Company.

Wherefore, defendant prays, on the grounds and for the reasons set forth in said motion, that this case be dismissed for want of jurisdiction, or in the alternative, that summary judgment be entered as prayed for in said motion.

(Signed) T. L. FOSTER,
(Signed) J. W. TIMMINS,
Attorneys for Defendant Sun Oil Company.

Filed: May 29, 1939.

OPINION ON MOTION TO DISMISS.

35 (Title Omitted.)

Turner, Rodgers, Winn & Sellers,
Dallas, Texas
For the Motion.
D. B. Chapin, and Tuck Chapin,
San Antonio, Texas,
Opposed.

Several years ago there were two State Court judgments against one Howard, within a county of the Tyler division of the Eastern District. On those State Court judgments a purported levy was made by the sheriff,

and certain lands were sold thereunder and bought in by one Bass, from whom the lands, ultimately and finally, were conveyed to the defendants.

The levy of the sheriff was probably void because he did not indorse the levy on the writ. When Bass paid for the lands at the sale, the moneys went for the benefit of the judgment creditors. The plaintiffs here, now claim that that situation created a trust against which the statutes of limitation were useless.

The plaintiffs were cast in the State District Court in a suit which they brought against the same defendants. That judgment was affirmed by the Court of Civil Appeals, 119 S. W. (2) 171, and an application for a writ of error to the Supreme Court was dismissed.

36 The plaintiff's plead in justification of this attempt, after their failure in the State Court, that the judgment in the State Court "was, and is, merely an arbitrary and capricious exercise of power, and is in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

The charge, "arbitrariness, and, capriciousness," is repeated several times in the petition, and there is also a charge of discrimination, and also, that the decisions "are so plainly arbitrary and contrary to law as to be, and are, mere acts of spoilation."

The defendants plead res adjudicata, and suggest that this Court has no supervisory power over the State Courts.

There are many cases which clearly show the correctness of the latter position. It should also be added, that

a cause which has been decided, and which decision has become final, may not be reviewed, nor, ignored, in the way that is attempted here, even though that decision may have been wrong.

There is a jurisdiction in the United States Court, by way of its equity power, to relieve against a judgment which has been obtained by fraud, but that fraud must be extrinsic. Such cases as Angle vs. Shinholt, 90 F. (2d) 296, state the Texas rule as to the necessity for, fraud, to relate to extrinsic matters. Also, see Phillips vs. Jenkins, 91 F. (2d) 189.

37 Circuit Judge Bratton for the Tenth Circuit, in Moffett vs. Robbins, 81 F. (2d) 431, writes interestingly along the same lines.

The power of a National Court to restrain the enforcement of a judgment which has been fraudulently obtained in a State Court, when the fraud is extrinsic to the matters tried, and, not determined by the State Court, and which did not cause the Court to render a wrong judgment, is well known.

A party suing in an action of that sort, to enjoin the enforcement of a judgment fraudulently obtained in a State Court, must show a valid defense to the cause on which the judgment was rendered, and *show that he was prevented by extrinsic fraud, accident, mistake, concealment, or, other chicanery, from presenting such defense, and that he has not been negligent in availing himself of his defense.* All intrinsic fraud—all matters that were included in the determination—are barred from further consideration, and, afford no right to enter a National Court.

Since this case does not come within the diagram of cases that are permitted to come to us, after having been determined in another jurisdiction finally, it is dismissed.

(Signed) WM. H. ATWELL,
United States District Judge.

Tyler, Texas,
June 15th, 1939.

Dora B. Hendron, et al,
vs. No. 25 Civil Action.
Yount-Lee Oil Co., et al.

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38 On this the 15th day of June, 1939, came on to be considered the motion to dismiss this cause for want of jurisdiction, as well as the motion for summary judgment, filed by Stanolind Oil & Gas Company, a Corporation, one of the Defendants in said cause and joined in by all other Defendants, and having duly considered said motions and all arguments of counsel thereon, said Court did on this date in open Court, announce its conclusions thereon, and it is accordingly ordered that said motions of the Defendant, Stanolind Oil & Gas Company to dismiss the bill of complaint be, and the same are hereby, granted.

It is, therefore, ordered, adjudged, and decreed, that the motions of Defendant, Stanolind Oil & Gas Company, to dismiss for want of jurisdiction joined by all other Defendants, be sustained, and this cause be, and is hereby, dismissed, and that Defendants recover of Plaintiffs all costs herein expended.

To each part and all of such rulings, order, and decree, Plaintiffs duly excepted in open Court, and all of such exceptions are hereby allowed.

(Signed) WM. H. ATWELL,
U. S. District Judge Presiding.

Filed: June 15, 1939.

39 NOTICE OF APPEAL.

Dora B. Hendron, et al, Plaintiffs,
vs. Civil Action No. 25.
Yount-Lee Oil Company, et al, Defendants.

Notice is hereby given that plaintiffs, Dora B. Hendron, joined pro-forma by her husband, R. B. Hendron; Emil Claude Howard and Glenn Howard, being all the plaintiffs in the above styled and numbered cause, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit, from the final judgment entered in this action on June 15th, 1939.

D. B. CHAPIN,
TUCK CHAPIN,
(Signed) Per D. B. CHAPIN,
Attorneys for plaintiffs.
Address: 309 Houston Bldg.,
San Antonio, Texas.

Filed: Aug. 31, 1939.

40 United States of America,
Eastern District of Texas, ss:

I, LEE SIMMONS, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original record on appeal as called for in the praecipe, in the case of Dora B. Hendron, et al vs. Yount-Lee Oil Company, et al., Civil No. 25, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my named and affixed the seal of the aforesaid Court at Tyler, Texas, this 25 day of September, A. D. 1939.

LEE SIMMONS,
Clerk.

(Seal)

By SUSIE KERR,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 165

DORA B. HENDRON ET AL.,
Petitioners,

vs.

YOUNT-LEE OIL COMPANY ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF AND AUTHORITIES IN SUPPORT THEREOF.

D. A. McASKILL,
TUCK CHAPIN,
D. B. CHAPIN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 165

DORA B. HENDRON ET AL.,

Petitioners,

vs.

YOUNT-LEE OIL COMPANY ET AL.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Dora B. Hendron Emil Claude Howard and Glenn Howard, hereinafter styled petitioners, respectfully present this their petition for a writ of *certiorari* as against Yount-Lee Oil Company, a Corporation, Stanolind Oil and Gas Company, a Corporation, Sun Oil Company, a Corporation, Fidelity Royalty Company, a Corporation, and S. G. Smith, all of whom are hereinafter referred to as respondents, seeking thereby to obtain a writ of *certiorari* to review a final decision of the United States Circuit Court of Appeals for the Fifth Circuit, rendered in a case between these parties on the 9th day of January, 1940, and finally, by overruling petition for rehearing seasonably filed in that court by an

order entered on the docket of said court on March 18, 1940, which action of the court affirmed a decree of the United States District Court for the Tyler Division of the Eastern District of Texas, dismissing the bill of complaint of your petitioners exhibited there against all of the respondents.

Your petitioners respectfully file herewith, as an exhibit to this petition, duly certified copies of the record in said cause, including the proceedings in the United States Circuit Court of Appeals; and also file herewith the necessary printed copies of said record and of this petition and the accompanying brief in support of same.

Statement of the Matters Involved.

This was a suit in equity filed in the District Court of the United States for the Eastern District of Texas, at Tyler, and jurisdiction was asserted on the grounds of diversity of citizenship and amount involved, wherein petitioners sought to engraft a trust on a judgment for a tract of land which had been rendered against petitioners and in favor of respondents in the District Court of Wood County, Texas, and which had been by petitioners duly appealed to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, in accordance with the law of Texas, and finally affirmed by said Court of Civil Appeals and from which judgment of affirmance your petitioners seasonably filed in the Supreme Court of Texas their application for writ of error, which application was denied. The grounds for relief sought in the bill are that said State court judgments were the result or harvest of a fraudulent conspiracy between the appellate judges and respondents to defraud petitioners out of their property.

The case made by the bill is this: That petitioners are the sole heirs at law of Z. T. Howard, deceased, who in 1904 was lawfully seized of the land involved: that in that year

two valid money judgments were rendered against him and valid executions were issued thereon and the land sold by the sheriff thereunder to one Bass, who bought in good faith and believed he was getting title and his purchase money discharged said judgments, and respondents hold and claim said land by *mesne* conveyance from and under said Bass. Contending that said sheriff's sale and conveyance to Bass was absolutely void and that Bass got no title by his purchase, but was subrogated to said judgment-creditors' claims, and that his possession was in subordination to petitioners right to redeem by doing equity, these petitioners filed suit in the District Court of Wood County, Texas, against the respondents to redeem said land and offered to do equity.

This suit resulted in a "take nothing" judgment against petitioners. This case was duly appealed to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, and in due course said Court of Civil Appeals announced its decision in that case (which is copied in full in the record at page 37), and affirmed said judgment, and in due course petitioners duly filed their application for writ of error in the Supreme Court of Texas in accordance with the law of Texas, which application said court dismissed.

By appropriate allegations it was set up that the judges of said appellate court entered into a conspiracy with respondents, wherein and whereby they agreed to affirm said district court judgment irrespective of fact and law, and that said State court judgments were concocted in and the result of such fraud on the part of said appellate judges and respondents. The items making up the judgment so concocted, conceived and rendered in fraud, were set forth, and it was appropriately alleged as a fact, with particularity, conciseness, and clarity that under the law and facts your petitioners were entitled to redeem said land from said void

execution sale, and had it not been that respondents corrupted said courts and said courts had not acted corruptly, judgment would have been rendered for petitioners. Then, by appropriate averments, it was set up that the respondents had acquired the legal title to petitioners' property, under said judgments, by so corrupting the courts, and the prayer is that they be decreed to hold the property as trustees and required to account. These facts were, of course, alleged more at length in the bill.

In response to the bill, the respondents filed their motion to dismiss, because the bill showed the petitioners had had a full hearing and the matter was *res adjudicata* and relief could not be given without setting aside the State judgments and the District Court had no power to set aside the State court judgment (R. 73).

Said District Court sustained the motion and entered judgment dismissing the bill (R. 75).

Transcript of the record containing all the foregoing was in due course lodged in the Circuit Court of Appeals, and upon due consideration the said Circuit Court of Appeals on January 9, 1940, affirmed the decision of the lower court, its opinion being reported as *Hendron* v. *Yount-Lee Oil Company et al.*, 108 F. (2d) 759 (Supp. R. 38).

In due course, petition for rehearing was duly filed (Supp. R. 42), and on March 18, 1940, the petition was denied (Supp. R. 47).

Thereby expressly holding that, although the District Court had jurisdiction by reason of diversity of citizenship and amount involved, and that the State judgments assailed were concocted in and the result of fraud of the State appellate judges, yet, the matter is res adjudicata and no relief can be given by an independent suit such as this, which we say, is in conflict with the doctrine of Arrowsmith v. *Gleason*, 129 U. S. 86.

Your petitioners aver that the reasons for requesting this writ of *certiorari* to bring said case to this Court for review, and upon review, reversal, are:

(a) That said Circuit Court of Appeals has decided an important question of Federal law, which (while we contend that by analogy it has been decided by the decisions of *this* Court, and decided contrary to the decision reached by the Circuit Court of Appeals, the decision of which court we fully believe to be contrary to the applicable decisions of *this* Court), should be settled by this Court, and of which the Circuit Court of Appeals in its decision said:

> "It is apparent that the judgments of the State court are *res adjudicata* and no relief could be granted without annulling the State courts judgment."

(b) That said Circuit Court of Appeals has decided an important question of Federal law which, we contend, is in conflict with the doctrine of *Arrowsmith* v. *Gleason*, 129 U. S. 86.

(c) That said Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

(d) That the questions involved in this case, and which will be presented on this review, are of great and immediate importance to the people of the State of Texas, and to the people of the United States and elsewhere, who may have controversies before the courts of Texas.

Under the allegations of the bill (and, of course, in the present state of the case, they must be taken as true), the judgment and decisions of the State courts complained of, were the result of a fraudulent combine between the appellate judges and the respondents, and if the validity of such judgments so obtained by fraud and brought under inspec-

tion, be upheld as it has been by the lower courts, it seems to us the upholding of such action will be a repudiation of the principles of equity as previously announced by the numerous decisions of this Court in analogous cases.

Finally, we have an abiding conviction that the efficacy of courts and their decrees will be increased and strengthened, when it is known that this high Court will engraft a trust upon a judgment obtained by the fraud of a court or of a judge.

As a part of this petition, and in support of the same, we present herewith a brief. If our brief may seem long, it is no more so than the great importance of the case justifies. We feel that we should be recreant in our duty to our clients and to this Court and unfair to ourselves if we presented the matter less fully.

May it please the Court, therefore, to grant unto petitioners a writ of *certiorari*, to be directed to the judges of said Circuit Court of Appeals for the Fifth Circuit, thereby commanding them, upon the receipt of said writ, to certify and remove said cause, the record therein, and all proceedings thereon, into this Court; and to stand and abide such order and direction as this Court shall deem meet and the circumstances of the case require.

And your petitioners will ever pray,

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Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 165

DORA B. HENDRON, ET AL.,

Petitioners,

vs.

YOUNT-LEE OIL COMPANY, ET AL.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The case is stated in the petition already set out, and it is unnecessary to repeat the same here. If we shall, before coming to the main part of the brief, point out the cardinal error in the decision below, and briefly discuss the effect of the allegations in the bill, which the decision holds did not state grounds for relief that a Federal court could give in a proceedings of this character, it will make for a better understanding of the case and be of aid to the Court in the ultimate decision of the question of whether the writ should issue.

The decision below, *Hendron* v. *Yount-Lee Oil Company*, 108 F. (2d) 759.

The substance of the decision of the Circuit Court of Appeals is summed in the following excerpts from the opinion:

> "This suit was brought * * * to recover 53.½ acres of land, etc. * * *
>
> "Jurisdiction was asserted by reason of sufficient amount involved and diversity of citizenship; and on the ground that certain judgments of the Texas State courts deprived plaintiffs of the equal protection of the laws and due process of law, in violation of the 14th Amendment.
>
> "Jurisdiction based on diversity of citizenship and sufficient amount involved was admitted.
>
> "Defendants pleaded *res adjudicata* and denied that a substantial Federal question was presented for decision.
>
> "Plaintiffs are the sole heirs at law of Z. T. Howard, who in 1904 owned the land in controversy.
>
> "In 1904, the land was sold by the Sheriff of Gregg County, on executions issuing from a justice of the peace court and the District Court, to W. R. Bass. Defendants hold by *mesne* conveyance from Bass.
>
> "In October, 1934, plaintiffs brought suit against defendants in the District Court of Wood County, Texas, to recover the land, alleging the invalidity of the sale on substantially the same grounds as are urged in the suit at bar.
>
> "That suit was decided against them by the district court and on appeal to the Court of Civil Appeals the judgment was affirmed. The Supreme Court of Texas denied a writ of error.
>
> "It is apparent the plea of *res adjudicata* is good unless the judgments of the District Court of Woods County, the Court of Appeals and the Supreme Court of Texas above referred to, are set aside as depriving plaintiffs of due process of law in violation of the 14th Amendment. In the case of *Susie Williams et al.* v. *Allen Tooke et al.*, — Fed. (2d) —, decided this day, on allegations of unconstitutionality *substantially* the

> same as in the case at bar, we had occasion to consider the jurisdiction of a District Court of the United States to set aside a judgment of a state court. On authorities cited therein, we held the District Court was without jurisdiction for want of the presentation of a substantial federal question. On the authority of that case the judgment is affirmed",

Which, we say, clearly demonstrates that said court entertained an erroneous view as to the effect of the allegations of the bill and a misconception of the settled rules of law and equity applicable thereto:

An erroneous view as to the effect of the allegations of the bill and relief sought, because the bill does not seek to *recover* the land, but to *engraft a trust* on the State court judgments because they were the harvest of or result of a fraudulent combine between the State judges and the defendants, respondents herein, and prayed that they be decreed to hold same as trustees and required to account.

An erroneous view of the nature of the State court judgments, because the bill avers, with due particularity, that your petitioners sought therein to redeem the land from the vendees of the purchaser of said land at an alleged void execution sale and offered to do equity.

A misconception of the settled rules of law and equity applicable thereto, because it is well settled by the decision of this Court that where the other conditions of jurisdiction being satisfied, *a District Court of the United States may, without controlling, supervising, or annulling the proceedings of State courts, give such relief as is consistent with the principles of equity;* that is, Federal and equity jurisdiction being present, the District Court may, by its decree, "*lay hold of the parties, and compel them* to do what according to the principles of equity they ought to do," thereby securing and establishing the rights of which the plaintiffs are alleged to have been deprived by fraud.

Bear in mind that, unquestionably, the lower court had *Federal* jurisdiction by reason of the amount involved and diversity of citizenship, the *controlling* question is, did it also have *equitable* jurisdiction? This question must be determined from the averments of the bill and the relief sought. Let us look to the pertinent portions thereof.

It is alleged with due particularity that plaintiffs are the sole heirs at law of Z. T. Howard, deceased, who prior to April 5, 1904, was seized of the land here involved; that prior to said date, two valid money judgments were rendered against said Howard, one in a justice's court of Wood County, the other in the District Court of said County. Valid executions were issued on said judgments and placed in the hands of the Sheriff of Gregg County for execution. That on April 5, 1904, said sheriff allegedly acting under the authority of said executions, sold and conveyed said land to W. R. Bass, who purchased in good faith and believed he was getting title to the land and whose purchase money was applied on and discharged said two judgments, and respondents hold by *mesne* conveyance under Bass.

It is alleged that in October, 1934, petitioners filed suit in said district court against respondents, in which they sought to redeem said land, contending that said sheriff's sale to Bass under said justice's court execution was void, because said sale was made after the return date of said execution, and also that the sale made under the district court execution was void because said sheriff did not indorse a levy on the land sold (or on any land) on the writ of execution as required by the statutes of Texas, and that said Bass got no title by his purchase, but his purchase money having discharged the judgments under which the land was sold, and he having purchased in good faith, he became subrogated to the judgment creditors' claims, and having entered into possession under said purchase, he was lawfully in possession as an equitable trustee or mortgagee

lawfully in possession with the right to retain such possession until equity was done him (R. 5-18), and that a "take nothing" judgment was entered against them, and they appealed to the Court of Civil Appeals and filed the record therein and their briefs containing their assignments of error (R. 21-32).

CONSPIRACY.

The bill avers:

"That after said briefs had been filed as aforesaid, the said appellees and their counsel well knew that under the cold logic of the law each of the aforesaid assignments of error would be sustained and the judgment reversed and rendered for these plaintiffs and that the Supreme Court of Texas would refuse a writ of error therein, and with the intent to defraud these plaintiffs out of their property, then and there conspired, agreed and confederated together to and they did attempt to camouflage the issues in the case, as is hereinafter more specifically shown, so as to form a basis or background upon which the said Court of Civil Appeals apparently could and would affirm the judgment below and the Supreme Court of Texas refuse a writ of error, and thereby and by reason thereof acquire plaintiffs' property without consideration, which as hereinafter shown, they did.

"That as hereinafter shown said appellees filed in said Court of Civil Appeals their counter-propositions in response to these plaintiffs' said assignments of error, as aforesaid, in which they intentionally misstated both fact and law, with the intent aforesaid, and as hereinafter shown the Judges of said Court of Civil Appeals and of the Supreme Court of Texas *connived* at such fraudulent conduct on the part of said appellees and upon their instance and demand ignored the settled rules of law in respect to the admitted facts, and acting solely upon such pretentions and contentions of said appellees, as hereinafter set forth, refused these plaintiffs any relief, and thereby gave

plaintiffs' property to the defendants without consideration" (R. 72-73).

The bill also avers with due particularity that the appellees in said cause in response to said assignments of error, in furtherance of said conspiracy, filed in said Court of Civil Appeals their counter-propositions in which they intentionally made false and untrue assertions of the facts, and erroneous propositions of law (R. 33-36).

It alleges that said Court of Civil Appeals overruled all of appellants' assignments of error and sustained all of appellees' counter-propositions, and held, in effect, that the sale of the land by the sheriff under said District Court execution passed title, as it was not necessary for the sheriff to indorse a levy on the writ of execution, but, if mistaken in this, then the conveyance by Bass of the land was a repudiation of the relationship of Mortgagor and Mortgagee, and limitations started to run (a copy of the opinion is set forth in the record, p. 37, *et seq.*), and the Supreme Court of Texas denied a writ of error.

The bill sets forth each of the holdings of said Court of Civil Appeals upon which it based its judgment of affirmance with due particularity, conciseness and clarity, and in each instance avers what is due process of law in respect thereto, and points out that each of said holdings is so gross as to be impossible in a rational administration of justice, and that each of said holdings is simply the result of said fraudulent combine between said appellate judges and the defendants, respondents here (R. 48, *et seq.*).

Then the bill avers:

> "Plaintiffs aver that they do not contend that the State of Texas, so acting by its aforesaid Judicial departments, committed mere errors of law in respect to the matters aforesaid, but charge that said courts, in so doing, acted fraudulently and with an 'evil eye and uneven hand,' and not judicially, and that their afore-

said acts are merely an exercise of arbitrary and capricious power, and in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights, and that their said conduct and acts was peculiar to said litigation and contrary to that accorded others similarly situated, and that they deliberately and intentionally awarded plaintiffs' property to the defendants without consideration, and thereby not only deprived them of their property without due process of law, but also denied them the equal protection of the law as heretofore shown, and by reason thereof United States Constitution, 14th Amendment was violated" (R. 70, 71).

The bill further avers:

"Plaintiffs aver that the defendants having obtained the title of plaintiffs' property in the manner hereinbefore set forth, and are holding and claiming same in virtue of the aforesaid judgment of the State Court, should be decreed to hold same as trustees for the plaintiffs, and required to convey same to plaintiffs, and account for the rents and profits of the land since April 5, 1904, less their proper offsets, and plaintiffs now offer to do and perform such equities in respect to the matters aforesaid as this Honorable Court may order and decree" (R. 71).

The prayer is:

"That a trust be engrafted on said judgment in favor of plaintiffs, and that they be permitted to redeem by doing equity" (R. 71).

Is it not too plain for argument that this suit is not for the *recovery* of the land, but seeks to *engraft* a trust on the State court judgment because it was concocted in fraud?

It is obvious, as we said in the petition for rehearing, that the court below misconceived, misapprehended and overlooked the indubitable fact that, although the bill as-

serted *Federal* jurisdiction on the grounds; (a) by reason of amount involved and diversity of citizenship; and (b) by reason of a Federal question; *i. e.*, the State court judgment deprived them of their property without due process of law and denied them the equal protection of the laws in violation of the guarantees of the 14th Amendment to the Constitution of the United States, it also asserted *equity jurisdiction* by reason of the averments that said State court judgments were the result of the corrupt and fraudulent acts of said State appellate judges acting as the alter ego's of the respondents.

It is likewise obvious that the court below overlooked the fact that *fraud* is one of the main-heads of equity jurisprudence.

Moreover, it is certain that the court below was adamant in its opinion that the State court judgment was impregnable on the ground of *res adjudicata*, and that equitable relief could not be granted without annulling said judgment.

Besides, in the State court these petitioners sought to redeem the land from an alleged void execution sale, and in the case at bar they seek to engraft a trust on the judgment entered in that case, and hence, the cases are not the same.

And with this familiarity with the case, and the way it was decided below, we are brought to a consideration of the decisions of *this* Court, and to show, if we can, that each of the reasons assigned in the petition for the writ is sound.

Discussion of Authorities.

Preliminary Statement.

The Constitution of the United States and the acts of Congress have conferred upon the Federal District Courts the jurisdiction to hear and determine controversies be-

tween citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, $3,000.00 in value. This suit presents such a controversy. It is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing that the State court judgments assailed were the harvest of a conspiracy between the State appellate judges and the respondents to defraud these petitioners out of their property. The District Court of the United States, unquestionably, has jurisdiction of this controversy, and the petitioners have the legal right to a hearing and a decision of the questions which the bill presents, and to the relief which the decision of these questions entitles them. That court may not lawfully renounce that decision. It cannot rightfully deny to the petitioners the right to the decree to which they show themselves entitled. It is not the judgment of the State court against which petitioners complain, it is against the defendants in said judgment. It is against the unconscionable use by these respondents of the judgment which they recovered by corrupting the court which rendered it.

It may be suggested to *this* Court that relief from a judgment tainted with the fraud of the court or judge cannot be had in an independent suit in equity. But the rule seems to be well settled that "corruption of the court" is ground for equitable relief. (See Bigelow on Estoppel (5th Ed.), p. 307; Bigelow on Fraud, Vol. I, p. 88, note; *Little Rock, etc., Ry. Co.* v. *Wells*, 54 A. S. R. 230; *United States* v. *Flint* (U. S. Circ. Ct. Cal., Sept., 1876, opinion by Mr. Justice Field); *Newton* v. *Stokes*, 30 Fed. 891, opinion by Mr. Justice Brewer.)

Mr. Justice Field, in *U. S.* v. *Flint, supra*, speaking on the subject, remarked that such a judgment is "*Fabula, non judicum*".

The adjudicated situation nearest to the one in the case at bar which we have been able to find is *Newton* v. *Stokes*, 30 Fed. 891, 892, where suit was filed in the State court by Mrs. Newton and judgment went against her, and afterwards she filed suit in the United States Circuit Court, seeking to set aside the State court judgment upon the ground that said State court judgment against her was obtained by perjury and the corruption and bribery of the judge.

The opinion in that case was written by Mr. Justice David J. Brewer, who was one of the Justices of the Supreme Court of the United States for more than twenty-five years, while sitting as a circuit judge. He said:

> "The matter which, of course, first arrests the attention, is that of the alleged corruption and bribery of the judge of the superior court; for, if these grave charges are true, not only would the judge himself receive the just condemnation of every honest man, *but in every court the judgment which he had sought by his wrong to lift up as a barrier to truth and justice would be wholly disregarded.*" (Italics ours.)

As said by Mr. Justice Bradley, in *Graffam* v. *Burgess*, 117 U. S. 180, 186:

> "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

Indeed, the fraud of a judge can rarely occur without a conspiracy between the judge and the party benefited.

In a note to *Little Rock, etc. Ry. Co.* v. *Wells*, 54 A. S. R. p. 230, it is said:

> "If there is fraud on the part of the court or judge, there seems to be no reason *why it does not constitute*

> as complete a ground for relief as if the prevailing party had been guilty thereof. Such fraud can rarely occur without a conspiracy between the judge and party benefitted, and, even if there be not such conspiracy in the beginning, the party benefitted ought to be regarded as joining therein when, being informed thereof, he seeks to retain the advantage." (Italics ours.)

Now, we say, it has ben conclusively shown; (a) that the court below had Federal jurisdiction by reason of amount involved and diversity of citizenship, (b) that the suit filed in the State court did not seek to recover the land, but sought to redeem the land from a void execution sale, (c) that this suit did not seek to recover the land, but sought to engraft a trust on the judgment entered in the State court by reason of the fraud of the judges and respondents, and (d) that such fraud constitutes a complete ground for equitable relief. We now reach the question, did the court below have jurisdiction to grant to petitioners the relief sought without setting aside the State court judgment?

This identical question has been settled by this Court in *Arrowsmith* v. *Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, where certain lands in Ohio, inherited by plaintiff, were sold by his guardian, under orders therefor regularly obtained by the guardian from the proper probate court, and the sales were held in due form and regularly confirmed by such court. The bill attacked the order of sale as invalid, prayed the guardian's deeds thereunder be declared void, and demanded an accounting at the hand of the guardian for rents and profits. The gist of the grounds for such relief is alleged to be the fraud of the guardian. This suit was brought in the United States Circuit Court, which sustained demurrer to the bill and dismissed the suit. In the brief of counsel for appellee (page 92, 129 U. S.), counsel, while not denying "the right of courts of general jurisdiction to set aside their own judgments and decrees on bills

of review, for errors apparent on the record, or original bills in the nature of bills of review, for fraud in obtaining the judgments or decrees, where such bills are part of the recognized practice of courts", specifically presented and urged that "the Circuit Court of the United States has no power to grant the specific prayer of the bill, and set aside and vacate the orders of the probate court of Defiance County, and declare the same void and of no effect." With reference to this point this Court says (page 99, 129 U. S.):

> "While there are general expressions in some cases apparently asserting a contrary doctrine, the late decisions of this Court show that the proper Circuit Court of the United States may, without controlling or annulling the proceedings of State courts, give such relief, in a case like the one before us, as is consistent with the principles of equity."

And as said by Circuit Judge Taft (afterwards Chief Justice of this Court) in *Rhino* v. *Emery,* 72 Fed. 382, 386:

> "More than this, the validity of the probate proceedings is attacked for fraud, and the jurisdiction of a Federal Court of Equity to compel restoration of lands or proceeds fraudulently acquired by such proceedings is clear. *Arrowsmith* v. *Gleason,* 129 U. S. 87, 9 Sup. Ct. 237. *A Federal Court of Equity where other necessary jurisdictional facts are present, has the right, without directly setting aside the proceedings in the State Court in which the sale is made, to lay its hands upon the guilty parties committing the fraud, and to hold them as trustees, for the defrauded one, to account for the proceeds of the action conceived and carried on in fraud."*

Authorities on the question could be mulitiplied, but we deem it unnecessary to cite others.

Rooker v. *Fidelity Trust Co.,* 263 U. S. 413.

It will be observed that the Circuit Court of Appeals cited the above case as authority for its holding that relief could

not be granted appellants *without setting aside the State Court judgments.* But nothing in that case is contrary to the principles for which we contend nor denies their application to the present case. There was no claim in that case that the judgment assailed was concocted by the fraud of the court or judge, hence that case has not the features which determines this.

So, we submit, these principles announced by this Court in *Arrowsmith* v. *Gleason, supra,* control the case at bar, which, although involving rights arising under judicial proceedings in a State court, is an original, independent suit for equitable relief between the parties; such relief being grounded upon the corrupt acts of the appellate judges, and as this case is within the equity jurisdiction of the District Court, as defined by the Constitution and laws of the United States, that court may, without annulling the State court judgment, lay hold of the parties and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the petitioners are alleged to have been deprived by fraud and collusion, and that the decision of the Court below being contrary to these settled rules the writ should issue.

Respectfully submitted,

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In the

UNITED STATES SUPREME COURT

No. 165

DORA B. HENDRON, ET AL.,

VS.

YOUNT-LEE OIL COMPANY, ET AL.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES SUPREME COURT

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YOUNT-LEE OIL COMPANY, ET AL.

REPLY TO PETITION FOR WRIT OF CERTIORARI

May it please the Court:

We submit herewith a brief outline of certain reasons why, in our opinion, Petitioners' application for writ of certiorari should be denied in this cause.

I.

Petitioners' contention that a Federal District Court can engraft a trust on State Court Judgments is valid only where acts of extrinsic fraud are alleged, and not where as in the case at bar, the alleged fraud, if any there be, touches only on matters intrinsic in the State Court Proceedings.

The above proposition, which goes to the very heart of Petitioners' application, was pointed out early in this case by Judge Atwell who heard and decided the cause in the District Court below and who filed a supporting opinion. We quote a brief excerpt from that opinion:

> "There is a jurisdiction in the United States Court, by way of its equity power, to relieve against a judgment which has been obtained by fraud, but that fraud must be extrinsic. Such cases as Angle vs. Shinholt, 90 F. (2d) 296, state the Texas rule as to the necessity for fraud to relate to extrinsic matters." Also, see Phillips vs. Jenkins, 91 F. (2d) 189.
>
> "Circuit Judge Bratton for the Tenth Circuit, in Moffett vs. Robbins, 81 F. (2d) 431, (Cert. den. 56 S. Ct. 940) writes interestingly along the same lines.
>
> "The power of a National Court to restrain the enforcement of a judgment which has been fraudulently obtained in a State Court, when the fraud is extrinsic to the matters tried, and not determined by the State Court, and which does not cause the Court to render a wrong judgment, is well known.
>
> "A party suing in an action of that sort, to enjoin the enforcement of a judgment fraudulently obtained in a State Court, must show a valid defense to the cause on which the judgment was rendered, and *show that he was prevented by extrinsic fraud, accident, mistake, concealment, or other chicanery, from presenting such defense, and that he has not been negligent in availing himself of his defense.* All intrinsic fraud all matters that were

included in the determination are barred from futher consideration, and afford no right to enter a National Court.

"Since this case does not come within the diagram of cases that are permitted to come to us, after having been determined in another jurisdiction finally, it is dismissed.

(Signed) Wm. H. Atwell,
United States District Judge.
Tyler, Texas,
June 15th, 1939."

The Circuit Court of Appeals then, in writing its opinion, could naturally assume that Petitioners knew of the distinction between extrinsic and intrinsic fraud and that the former, which had not been alleged, was the only character of fraud of which a Federal equity Court could take hold.

Petitioners concededly have made a collateral attack on the State Court judgments. In the case of *Fagin vs. Quinn*, 24 F. (2) 42 (Certiorari denied 277 U. S. 606), it was held that the rule against collateral attack by allegations of intrinsic fraud applies, even though the relief sought is to engraft a trust on earlier State Court judgments. That case, like this, arose from the Eastern District of Texas, was an attack on an earlier State Court judgment, and, also like the case at bar, prayed that Defendant therein be charged as constructive trustees. The Court there sustained Defendant's plea of res adjudicata, saying "Where the issues are identical the

fact that the relief prayed for is slightly different, is immaterial. * * * That (State Court) decision became final and, whether right or wrong, cannot again be brought in question by an original Bill in a Federal Court."

II.

The Circuit Court Judgment was correct, for Petitioners' bill below was actually an attempt to appeal from the State Court Judgment, whereas appeal from a State Supreme Court lies direct to the United States Supreme Court.

Petitioners' sole remedy was by going direct to the Supreme Court of the United States from the Supreme Court of Texas, and not by an original Bill in equity.

28 *U. S. C. A., Sections* 41 and 344;

Tidal Oil Co., vs. Flanagan, 263 U. S. 444;

Frazier Company vs. Long Beach, etc., 77 F. (2d) 764;

Rooker vs. Fidelity Trust Co., 263 U. S. 413;

Fryberger vs. Parker, 28 F. (2d) 493.

III.

The Circuit Court was correct in giving as one basis for its judgment of affirmance the fact that no substantial Federal question was alleged by Petitioners.

A careful reading of the original Bill will show that, aside from complaints as to the entry of judgments and

"arbitrary" holdings, no allegation of *fact* can be found therein which constitutes fraud. Actually, the Bill is one which alleges conclusions of law alone and which seeks to make a case of fraud simply by using the word "*fraud*" and similar phrases over and over. Such allegations, it has been many times held, do not state a substantial Federal question as against a general demurrer, or a motion to dismiss.

Silberschein vs. United States, 266 U. S. 221;

Collins vs. Johnston, 237 U. S. 502;

Marquez vs. Frisbie, 101 U. S. 473;

Ambler vs. Chotau, 107 U. S. 586;

Van Weel vs. Winston, 115 U. S. 228.

CONCLUSION

WHEREFORE, Respondents respectfully pray that this Court deny Petitioners' application for writ of certiorari.

Respectfully submitted,

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